LAW AND CONTEMPORARY PROBLEMS

TRANSPORTATION
Part II

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TRANSPORTATION: PART II

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LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

Little more than a year ago, labor disputes had grounded a substantial portion of the nation's commercial air fleet. And recently there have been some ominous prophecies that American trains might be halted in some future clash between financially hard-pressed rail carriers, intent on cutting wage costs, and powerful unions, seeking to protect the jobs of their members. During 1959, events in the steel industry demonstrated vividly the importance of labor peace to the national economy.

Against this backdrop, it is not surprising that this issue of the *Transportation* symposium commences with articles concerning labor problems. In the first paper, Mr. Oliver examines the labor milieu on land and sea and in the air. Next, Mr. Wisehart reports on the experience with the Railway Labor Act, which now applies to both rail and air labor disputes; and he concludes that some repair of the present system is definitely in order and that perhaps the air carriers should be placed within an entirely different statutory framework. Mr. Henzey then discusses the struggle between airlines and labor unions and the jurisdictional disputes that have accompanied the transition of commercial aviation into the jet age.

High American labor costs in the construction and operation of shipping have helped induce Congress to enact the merchant-marine legislation that is then surveyed by Chairman Morse of the Maritime Administration. Very notable in the effort to sustain a strong merchant marine is the requirement that American vessels be preferred for carrying certain overseas shipments made pursuant to various governmental programs. Cargo preference—heretofore rather neglected by legal periodicals—is comprehensively treated next by Mr. Olson.

Even though it may be aided by various forms of governmental action, a carrier is not immune from the necessity of raising capital to finance its operations—and to do so usually involves the large-scale issuance of securities. So far as the transportation industry is concerned, corporate executives may be confronted with federal regulation from either of two agencies—the Interstate Commerce Commission and the Securities Exchange Commission. The demands and standards of these regulatory agencies are often quite distinct, as Mr. Turney indicates in the article that follows. (Of course, the existence of difference in the approaches of the two agencies

to problems of securities flotation was also highlighted by the recent *Alleghany* litigation.) An entirely distinct field of federal regulation of transportation—the regulation of domestic small shipment services—is Mr. Miller's subject.

In so far as certain types of ICC regulation of motor carriers are concerned, the significant—and controversial—"agricultural exemption" was carved out by Congress some twenty-five years ago, when the Motor Carrier Act became law. This exemption has since become the darling of farmers' groups and others, but it has, on the other hand, drawn the wrath of many common carriers. And as Dr. Linnenberg next points out in his definitive discussion of the subject, despite the recent congressional redefinition of the agricultural exemption, the controversy bids fair to continue.

Whatever the resolution of such problems as exemptions, however, one problem—that of national defense—and, with it, of military traffic—will undoubtedly remain. Mr. Randolph, in the closing article, gives insight into the unique demands that military traffic must make upon the American transportation system and explains some of the administrative techniques that have been devised and provisions of law that have been enacted in response to these demands. While Mr. Randolph purports to be writing primarily from the viewpoint of a military traffic manager, his article has an exceedingly broad perspective, and as a dividend, he refers to several impending transportation innovations which will benefit not only military traffic, but also the vitality of the entire transportation system.

In concluding this foreword, it seems appropriate to emphasize that many significant innovations are just over the horizon in American transportation. Jet-age developments in commercial aviation are already well-known; the motor carriers are developing new techniques; and even the railroads, long accused of sluggishness, seem to have awakened from their lethargy. Perhaps this symposium will help its readers to anticipate and evaluate the future in transportation and to make a reality of the bright possibilities that are a part of that future.

ROBINSON O. EVERETT.

LABOR PROBLEMS OF THE TRANSPORTATION INDUSTRY

ELI L. OLIVER*

INTRODUCTION

Labor problems of the transportation industry have been given a great deal of publicity during the past year. Most of the major American airlines have been shut down by strikes of one group or another in the recent past.[1] James Hoffa and the International Brotherhood of Teamsters have been starring in congressional hearings, court proceedings, and television shows, as well as in magazine and newspaper stories. Local transit labor disputes have been on the front pages in several of the largest cities. A brief boycott of "runaway" ship lines seems to be the prelude to a world-wide maritime labor conflict. Railway management officials fired in February 1959 the first gun in what has become the most serious railway labor dispute in a generation,[2] while unemployment, though less publicized, is among the most critical of current transportation problems.[3]

These situations have not arisen suddenly; the problems now boiling over have been heating up for a long time. Most of them are current manifestations of continuing conflicts, closely related to underlying economic and governmental conditions. Some types of labor problems are common to all industry, but each industry's problems have peculiar features arising out of its own individual characteristics. This is particularly true of transportation. Its special features, though doubtless well known, should be recalled in summary as a preliminary to any consideration of new legislation affecting transportation employment.

Physically, the several divisions of the industry are engaged in the transportation: (a) of goods and passengers; (b) by ship, airplane, train, and motor truck and bus; and (c) either locally, between cities, nationally, or internationally. From a strictly economic point of view, these forms of transportation may be considered either as competitive with one another or as supplementary. Integration of all types of transportation is industrially feasible; the Canadian Pacific transportation system owns and operates rail lines, air lines, bus lines, truck lines, and ships on the Great Lakes and both the Atlantic and Pacific Oceans. The Canadian National Railway, owned by the Canadian Dominion Government, is the center of a similarly integrated transportation system, the two integrated systems competing throughout the country. Government regulation in the United States has insured

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[1] Traffic World, Dec. 6, 1958, pp. 15, 42; *id.*, Jan. 17, 1959, p. 21.

[2] *1959 Target: Featherbedding*, Railway Age, Feb. 16, 1959, p. 9; *Management 'Featherbed'?*, *id.*, Feb. 23, 1959, pp. 10, 58.

[3] Transport Economics, Jan. 1959, p. 5.

that, with few exceptions, each of these various types of transportation facilities is owned and operated separately from the others.

Historically, these transportation media were developed separately, and each of them in segments. Highways, railways, airlines, and waterways were built to connect particular localities, or to serve specific needs. Their subsequent linking into through routes made manifest the duplications, gaps, and circuitous courses that resulted from piece-meal construction. The distribution of industries and population, particularly in the West, was largely determined by the availability of transportation, and that distribution later tended to perpetuate existing transportation routes. Many of the major problems of the railroad industry and its employees have their origin in efforts to correct the results of unplanned early railroad expansion.

Added to these physical, economic, and industrial characteristics, as a major factor in the settling of labor relations, is the dominating public interest in safe, efficient, uninterrupted, economical, adequate, and nondiscriminatory transportation service. The public interest led, in turn, to the elaboration of a complex web of governmental regulation, at every level and over every form of transportation. Though the regulation was occasioned by public reaction to high rates, discriminations, and other abuses in early transportation history, it has not all been negative or prohibitory. In particular, governmental assistance or subsidy has been a factor in the development and maintenance of all types of transportation facilities; in local transit, public ownership and operation have become the predominant practice in the largest American cities.

This network of governmental regulation has a multiple relationship to transportation employees. Part of the network deals directly with labor conditions, but every regulation of any section of the industry inevitably has at least an indirect effect upon the employees. Labor organizations, particularly those of railway workers, have tried to influence governmental regulation in a manner that would minimize its harmful effects on their members. Railway unions have led all labor, in some instances, in establishing basic labor rights; and in other instances, they have gained substantial improvements through legislation or administrative action. This complex relationship between transportation unions and the various forms of government regulation of the industry must be kept in mind in considering additional legislation on any transportation labor problem.

Another significant factor, tying in with existing governmental regulation, is that the form of labor organization has mirrored the divisions, structure, and history of the transportation industry. There are two major divisions in the form of labor organization, and there is a parallel division in the governmental handling of labor conditions.

In the three sections of the industry that are most definitely national in scope—the railways, airlines, and waterways—labor organization is predominantly on a craft basis. There are twenty standard international railway labor unions; there

are at least three separate organizations of airline flight personnel, and separate craft unions of nonoperating employees; there are separate organizations of licensed and unlicensed maritime workers, separate craft organizations of ship-maintenance men, and separate unions of longshoremen. In each of these three types of transportation, the men who operate the vehicles are in the minority; they are outnumbered by clerical, maintenance, and other groups by four or five to one. The fact that these operating men are in the minority, but have the greatest collective bargaining power, led to their separate organization. On the railways, only the train and engine service groups and the telegraphers had the power to organize and win bargaining rights in the era when both government and employers were most determined in opposition. Operating groups in all three of these sections of the industry have felt that inclusion in a general union, where they would be greatly outnumbered, would dilute their bargaining power and would not give as favorable action on their wage rates or as good an understanding or handling of their special working conditions as could be secured through craft action.

Each of these three sections of the industry has its own separate unions of operating employees. Some nonoperating unions, on the other hand, have membership in all of these (and to some extent in other) sections of the industry. The Brotherhood of Locomotive Engineers, the Order of Railroad Conductors and Brakemen, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America are limited, almost entirely, to the railroad industry;[4] the International Association of Machinists, on the other hand, has membership among maintenance workers in all three of these sections of the industry, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees also represents airline employees of the classes listed in the union name.

Labor conditions of employees of railways, airlines, and waterways are federally regulated, with the first two groups coming under the Railway Labor Act.[5] Legislation somewhat similar to this Act, governing labor relations in the merchant marine, was adopted in 1936,[6] but expired by its own terms in 1941 and was not extended. In each of these sections of the industry, other federal regulation affects the employees, directly and indirectly.

The make-up of the labor force in motor-truck and bus and street-car transportation is basically different from that of rail, air, and water transportation. In local transit (a term used to include street-car, bus, subway and elevated service), operating employees outnumber nonoperating by three to one. The same is true in over-the-road bus transportation. Truck drivers also outnumber nonoperating employees in truck transportation, both local and intercity. Neither

[4] There are exceptions; the Brotherhood of Railroad Trainmen does have, for example, a number of agreements covering intercity bus drivers.

[5] 44 Stat. 577 (1926), as amended, 49 Stat. 1189 (1936), 45 U.S.C. §§ 151-88 (1952).

[6] 52 Stat. 965 (expired June 23, 1941).

bus nor truck operating employees need be afraid of domination by nonoperating crafts. Local transit and over-the-road bus employees are organized in industrial union form—the great bulk of them in the Amalgamated Association of Street, Electric Railway, and Motor Coach Employes of America. Truck drivers, helpers, and warehouse and storage employees, with some other nonoperating employees, are in the International Brotherhood of Teamsters, a craft union in form, but almost industrial in intercity truck transportation. Although hours of service of intercity bus and truck drivers are limited by the Interstate Commerce Commission, under the Interstate Commerce Act, there is no federal regulation of collective bargaining, and no machinery for the settlement of labor disputes, for motor-bus or truck employees, except that which applies to all labor. Some states do have special statutory regulation of collective bargaining in local transit, and cities where transit facilities are publicly-owned have various provisions for fixing wages and working conditions (usually by collective bargaining, with one or another type of arbitration for ultimate settlement of disputes).

The Amalgamated Association has in its international constitution the requirement that its local unions must propose arbitration in any dispute that cannot be settled in negotiation; strikes are prohibited unless arbitration has been rejected by management. This constitutional requirement has been accompanied by agreements with management—or by equivalent action of local public-transit authorities—specifically providing for arbitration not alone of grievances, but also of disputes arising out of proposals for change in wages or working conditions. In motor-trucking, the International Brotherhood of Teamsters does have arbitration agreements but relies principally upon direct economic power in its collective bargaining with employers.

I

THE AIRLINE INDUSTRY

Among these divisions of the transportation industry, the airlines have been most involved in strikes during 1958 and 1959. Five major airlines were forced to suspend operations because of strikes in that period—American Airlines, Capital Airlines, Trans World Airlines, Eastern Air Lines, and Western Air Lines. Taken together, these airlines constitute fifty per cent of the air transportation industry. In each of those disputes, except that involving Western Air Lines, the full procedures of the Railway Labor Act were followed, including hearings before presidential emergency boards. Whether or not the National Mediation Board and the emergency boards functioning under the Act can be blamed for failing to bring about peaceful settlement of these disputes, the fact remains that they were unsuccessful.

The Railway Labor Act was originally drawn, and has since been amended, primarily to fit the needs of the railway industry. Congress, and the public generally, was so impressed with the early success of the Act that it seemed only

necessary to add a title bringing air transportation under the Act to assure peace in that field. A similar suggestion was made, but abandoned, with respect to the maritime industry. Title two, covering airlines and their employees, was added to the Railway Labor Act in 1936.[7]

The fallacy in this extension of the Act has now become clear. Railway managements and unions had had long experience in collective bargaining when they drew up the original Railway Labor Act together in 1926. Both were accustomed to joint national action. Their maturity has been the principal factor in the success of the law. But the consummate ability of the late Dr. William M. Leiserson, Chairman of the National Mediation Board from 1934 to 1939, and in 1943 to 1944 (at a time when airline labor problems were of minor importance), was largely responsible for the development of Board procedures fitted to the needs and character of the railway industry. Neither airline managements nor the organizations of flight personnel have the collective bargaining experience presupposed by Railway Labor Act procedures. Moreover, the National Mediation Board cannot now, without neglect of railway labor relations, undertake the adaptation of its staff and procedures to the very different conditions on the airlines.

Among those conditions is the failure, thus far, of both airline labor organizations and airline companies to develop necessary co-operation among themselves. Separate unions, bargaining separately with individual airlines on wages and working conditions that should at least be co-ordinated, present an almost insuperable problem to the kind of mediation or emergency board procedure contemplated in the Railway Labor Act. Separate collective bargaining at the moment has the further handicap that officers of one leading airline union fear impending technological change will lessen employment opportunities for their members—and are, accordingly, determined to take over at any cost the work done by members of another union. The absolute economic power of that "raiding" union makes its jurisdictional claim a menace to the industry and its patrons.

Under these circumstances, serious consideration should be given to the creation of a separate agency, by agreement or by law, to handle labor disputes on the airlines. Managements and unions alike should have learned from the "recent unpleasantness" that they must join in developing effective procedures for settling labor disputes. It is not appropriate here to suggest how those procedures should depart from accepted railway practice, but certainly much greater emphasis should be given to the encouragement of voluntary arbitration. Either the Secretary of Labor, the National Mediation Board, or the Senate Labor Committee might initiate an effort to get joint acceptance of new legislation if effective disputes procedure cannot be set up by agreement. Public hearings might point the way to such legislation, even if management and employees could not reach complete agreement on its provisions. In any case, it would be extremely unwise to base

[7] 49 Stat. 1189, 45 U.S.C. §§ 181-88 (1952).

any amendment of the Railway Labor Act on these airline strikes, except whatever amendment is necessary to make explicit and definite the separation of railway and airline disputes machinery and procedure.

Air transportation will certainly increase greatly during the next decade. National dependence upon air transportation will perhaps never be so great as upon surface transportation, but the experience of the last years demonstrates that airline strikes can cause extreme inconvenience and heavy financial losses to the public served. Airline employees have been most unfairly dealt with on many occasions, and airline companies have suffered from unnecessary interunion friction. The whole field of airline labor relations should be carefully reconsidered by unions, managements, and public authorities to provide greater assurance of effective collective bargaining during the period of expansion of the industry just ahead. The latest series of disputes gave reason to believe that safety of air transportation is involved in airline labor relations. Whatever machinery and procedure is established for handling such disputes not only must be fitted to other characteristics of the industry, but must, above all, provide for definite, fair, technically sound, and final settlement of any question affecting safety of operations—either within the collective bargaining process itself or by reference to other airline regulatory agencies.

II

THE TRUCKING INDUSTRY

The absence of federal regulation of collective bargaining in motor-truck transportation similar to that applying to railways and airlines is probably attributable to the fact that this mode of transportation has only recently become really significant nationally. In 1946, motor trucks handled 81,600,000 ton-miles of intercity freight, or 8.65 per cent of the United States' total.[8] In 1957, intercity motor truck traffic was 261,000,000 ton-miles, or 19.3 per cent of the United States' total.[9] Rail traffic totalled 643,000,000 ton-miles in 1946 and 626,000,000 ton-miles in 1957. Intercity truck traffic has thus increased from 12.7 per cent to 41.7 per cent of rail freight traffic in eleven years. But motor-truck labor problems are growing even faster than their operations.

Publicity attendant on the investigations of the International Brotherhood of Teamsters and its officials may have obscured the fact that there are two major problems being outlined. The first lies in any misdeeds of which the officials may be guilty. The second lies in the danger of national labor conflict in the industry. The two, of course, are interrelated, in that if the union is in fact controlled by dishonest men, there is danger that destructive strikes may be called without real justification or for improper purposes.

The central fact is that the International Brotherhood of Teamsters was organized and adapted to function locally, especially in the construction industry. That

[8] ICC, STATEMENT NO. 544, INTERCITY TON-MILES 1939-1952, at 4, 6, tables 2 and 3 (1954).
[9] ICC 72D ANN. REP. 10 (1958).

industry, like many service trades and small-scale manufacturing industries, was characterized by ruthless, anarchic competition. Imposition of "slave and starve" labor conditions by some employers was often a part of that competition. The sweat shop in the apparel industries was one of the worst illustrations of those conditions. Neither local nor federal government did anything effective to prevent unfair competition or maintain order. The result was that owners and labor organizations themselves began to police their industries by whatever means were available. Local truck drivers were an important factor in those efforts at self-regulation. Not unnaturally, these police operations frequently led to abuses, by individual businessmen as well as individual union officials. Nonlegal sanctions for more or less legitimate purposes merged into illegal coercion for indefensible purposes. The unofficial police sometimes became violent and corrupt—which has happened, occasionally, even to official police. Some of the methods of legitimate self-policing employed by business and labor groups were also used with modifications to set up and operate "rackets."

Another conditioning factor is that union organizing efforts in the years when the Teamster pattern was being set were met with violence, bribery, frame-ups, and all the techniques in the manual of the private detective agency, often with the assistance of local judges, police, and public officials. Union representatives fought back, and some of them "bettered the instruction" of employer representatives. Being arrested for union activity was no disgrace in that era. Building trades workers were organized in such continuing savage warfare.

Whatever the reasons, there has been too much violence and corruption in the construction industry, as well as in other local industries, in many communities. Labor relations have been infected with the malady, and the teamsters have not been immune. Teamster union officials exposed to and trained for such local conditions have suddenly become national officials with great responsibility in a major section of the transportation industry. The industry is national, though national collective bargaining has not yet begun; even regional bargaining is a very recent development. Teamster officials have come from their local battles "not in entire forgetfulness" and certainly not "trailing clouds of glory." They have not yet learned or adapted themselves to the ethical standards of other national transportation unions—unions that have been free up to now from any suggestion of corruption. Those other unions, and American labor generally, are bringing tremendous pressure to bear upon the International Brotherhood of Teamsters, at all levels, to "clean house." Congress has passed legislation seeking to deal with abuses of the kind revealed in the McClellan Committee investigations.[10] The danger, of course, is that in the effort to clean up the *enfants terribles* of the labor movement, the legislation may be such as to "toss the baby out with the bath water."

[10] Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519.

The second half of the motor-truck labor situation needs immediate attention. Congress might well consider legislation to facilitate the peaceful settlement of disputes affecting intercity motor transportation of commodities. There is little likelihood of getting co-operation in drafting such legislation between the industry and the International Brotherhood of Teamsters (analogous to that in the railway industry preceding the passage of the Railway Labor Act of 1926 referred to above). But in view of the rapid development of the industry and the character of its collective-bargaining relations, some beginning at least should be made. Here, again, it is important that the handling of railway labor disputes not be jeopardized by the addition of a motor-truck section to the Railway Labor Act, although its basic principles could be adapted to truck transportation.[11] Under a separate administrative agency, perhaps the Federal Mediation and Conciliation Service, motor-truck legislation might well include specific provision for mediation, voluntary arbitration, and governmental fact-finding, with prohibition of strikes or lockouts until such procedures had been followed. The effect of such legislation not only would be a regularizing of collective bargaining and a protection to the public, but would also lessen the opportunity for any "undesirable" among teamster union officials to misuse his power by threatening or calling "quickie" strikes for improper objectives.

The need for such legislation was not really increased by the announced intention of James Hoffa, President of the International Brotherhood of Teamsters, to set up a Conference of Transportation Unity in alliance with other transportation unions. Maritime or waterfront labor organizations might find the assistance of the teamsters' union of great value in some of their current disputes with ship operators. But alliance with those unions would add very little to the economic power of the teamsters. Only by inducing railway labor to accept his leadership, or at least to work with him, could Mr. Hoffa increase significantly the power of his own organization. No one with the slightest knowledge of the railway unions, their leadership, their policies, or their history could entertain for a moment the idea that such an alliance is possible. Mr. Hoffa himself must know that he could not get railway labor co-operation. He should have realized, also, that the threat of a comprehensive transportation labor alliance under his leadersip—however empty the threat really is—could only increase the pressure for court action and legislation to deal with conditions allegedly found in the Teamsters. To some observers of these developments, it seems that Mr. Hoffa is "swinging wildly," a probable indication that he is about to "strike out." Certainly it would be a mistake to try to deal by legislation or any kind of regulation with that phase of the truck-driver situation.

[11] Since both airline and motor-truck labor relations are as yet undeveloped and formless, it might be possible to deal with both areas through a single governmental agency. Tying that agency to the National Mediation Board (railway) in any but a loose administrative fashion, however, could only impair the functioning of both.

III

THE SHIPPING INDUSTRY

Conditions closely analogous to those responsible for the violent labor conflicts in local industries in the 1920's underlie the recently dramatized efforts of American maritime unions and the International Transportworkers' Federation (ITF) to bring the "Panlibhonco"[12] runaway ship operators back under accepted labor standards.[13] The common feature in these apparently widely different situations is the attempt to establish minimum labor standards, by legislation and by collective bargaining, where competitors serving the same market can evade those standards and operate with substantially lower wages and inferior working conditions.

In their early efforts at organization, workers in the construction industry, in service trades, and in such light small-scale industries as apparel manufacturing were able to improve labor standards in particular plants or areas. Many employers were very willing to co-operate in making such improvements. Some states were willing, by legislation, to set reasonable minimum standards for factory workers. But other employers and other states saw in that progress only an opportunity for them to undercut competitors who had agreed or were by law compelled to maintain fair labor standards. Trade unions and employers alike realized the necessity for complete labor organization of strictly local industry. State government officials came to understand that only federal legislation (enforced by an administration and officials genuinely sympathetic to its purposes) could make minimum legislative standards effective. The rapid development of labor organization since 1933 and the passage of the Fair Labor Standards Act,[14] National Labor Relations Act,[15] and the Social Security and Unemployment Compensation Act[16] have done a great deal to limit the competitive advantage possible through imposition of low labor standards. Nevertheless, the "runaway shop" remains a major problem to American labor and industry.

That problem, interstate in other industries, is international in maritime transportation. Federal legislation in the United States had even by 1940 accomplished a great deal in improving conditions for all American ship-operating, maintenance, and waterfront workers. Labor organization in this country and in the maritime nations of western Europe became virtually complete at the end of World War II. The combination of collective bargaining and governmental regulation established standards that were high as compared with prewar conditions and with those prevailing among maritime workers of nations with negligible merchant marines. American wages and other conditions are substantially better than those

[12] See p. 12 *infra*.

[13] Becu, *A Unique Trade Union Action*, 19 INT'L TRANSPORTWORKERS J. 1 (1959). *Cf.* N.Y. Times, Jan. 22, 1959, p. 62, col. 3; *id.*, Jan. 23, 1959, p. 49, col. 2; *id.*, Jan. 28, 1959, p. 61, col. 4.

[14] 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (1952).

[15] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-66 (1952).

[16] 49 Stat. 620 (1935), as amended, 42 U.S.C. §§ 301-1305 (1952).

of European maritime workers, which are, in turn, far superior to those of non-maritime nations.

Thus far, however, there has been nothing to prevent the transfer of ship operations from the United States or any of the leading maritime nations to registry under the flag of any other country. American shipowners particularly, but many from other leading nations as well, have taken advantage of this opportunity to escape governmental and collective bargaining standards. The four nations whose "hospitality" to foreign ship companies has been most used are Panama, Liberia, Honduras, and Costa Rica (hence "Panlibhonco"). The problem had already become very serious, and strong labor protests were being made, when by 1950, 3,300,000 tons of shipping were registered "as of" Panama, and 523,000 tons under the Honduran flag, with none recorded as under the Liberian and Costa Rican flags.[17]

By 1955, the four countries had 8,700,000 tons of shipping registered, with Liberia having almost half of the total. In 1956, the total had risen to 10,400,000 tons, Liberia alone having registered 5,600,000 tons.[18] The "Panlibhonco" proportion of the world's merchant marine had risen from five per cent of the total to ten per cent in six years. Labor spokesmen estimate that at the end of 1958, the shipping registered under the four flags had risen to 24,000,000 tons,[19] or sixteen per cent of the world total. By comparison, the total shipping under the American flag had dropped from 27,500,000 tons in 1950 to 26,100,000 tons in 1956, including Great Lakes shipping.[20] These figures, though on not exactly the same basis, are a rough measure of the "Panlibhonco" problem.

Registry under these four "flags of convenience" has been especially used by American oil companies. In 1946, there were 268 tankers, of 4,200,000 tons, flying the American flag in foreign trade; in 1957, there were only seventy-two tankers of 1,400,000 tons.[21] Even since 1950, the drop has been just over fifty per cent in the number, just under fifty per cent in the tonnage, of active tankers of American registry in foreign trade. American foreign trade, exports and imports, in tankers in 1950 totaled 118,400,000 tons, fifty-three per cent of which was carried under the American flag; by 1957, of the total 108,300,000 tons of American foreign trade carried in tankers, only seventeen per cent was in ships of American registry.

On the other hand, not one ship was recorded by the Statistical Office of the United Nations as entering any port of Liberia, Honduras, or Panama in 1955 or 1956 (1957 data have not yet been published). The total freight loaded and unloaded from ships entering harbors of the fourth country, Costa Rica, was only

[17] U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 932 (1952) [hereinafter cited as STATISTICAL ABSTRACT].

[18] *Id.* at 941 (1958).

[19] *Sea Unions Push Flag-Issue Drive*, N.Y. Times, Jan. 23, 1959, p. 49, col. 2.

[20] STATISTICAL ABSTRACT 953 (1957); *id.* at 941 (1958).

[21] *Id.* at 593 (1958).

700,000 tons in each of the two years.[22] The four countries have no foreign trade by sea, but they are among world leaders in merchant marine registry.

Not all of the incentive for the "runaway" registration under these "flags of convenience" is in wages and working conditions. The ship operators are also able to avoid a substantial amount in taxation in the countries where the ships are actually owned. But the labor organizations of the maritime countries rightly concluded that the practice of "Panlibhonco" registration was a major threat to labor standards that have been established jointly by law and collective bargaining in all of the principal maritime countries.

The problem had been under consideration, and some protests had been made, since 1949 at least. In the fall of 1958, the ITF—a world organization of transportation unions—organized a protest boycott of the "Panlibhonco" ships. The boycott was planned to last only four days, from November 30 to December 4. American seamen's unions were most active in urging and organizing the movement; other world-wide labor groups, including the powerful International Confederation of Free Trade Unions, supported the boycott. Waterfront organizations affiliated with the ITF refused, during those four days, to unload or otherwise service the "runaway" ships. Omer Becu, able and energetic Secretary of the ITF, stated that the boycott was ninety per cent effective.[23] One of the four "convenience" nations, Costa Rica, took steps just as the boycott began, to stop the use of its flag by the "runaway" ship operators. Newspapers and magazines in all of the maritime countries gave top publicity to the movement. It has been made clear, ever since the protest was first announced, that it is only a preliminary to a more widespread and continuing action if the "runaway" practice is not ended.

No one government can handle this problem satisfactorily, although a great deal can be done to minimize the abuse. The ITF has called upon the Intergovernmental Maritime Consultative Organization to take up the question as part of an effort to get simultaneous action by the several governments most involved. The real reliance of both the employees and the owners operating under flags of their own nations is upon the direct economic power of the labor groups, especially the longshoremen, the ship-repair workers, and the petroleum workers. Unions of these workers, coordinated through the ITF, can, without doubt, put enough pressure upon the ship operators to force them to re-establish union conditions, even though under "convenience" flags. The waterfronts of the world may see some vigorous action before the situation is stabilized. It is difficult to understand how United States Government officials can condone, as some of them seem to do, the evasion and undermining of our legal standards by "runaway" American shipowners.

[22] *Id.* at 953 (1957); *id.* at 941 (1958).

[23] *Sea Unions Push Flag-Issue Drive*, N.Y. Times, Jan. 23, 1959, p. 49, col. 2.

IV

THE RAILROAD INDUSTRY

Turning, finally, to railway transportation, it is to be noted that its current labor problems originate, for the most part, in technological changes both on the railways and in other types of transportation. These changes affect railroad employment in different ways, and there are open to railway employees a variety of courses for dealing with the problems. Of the changes in other sections of the industry, the development of highway and airline transportation has had a multiple effect on both passenger and freight traffic, and employees of the railways. Within the industry, movements toward merging of companies, facilities, or service have combined with increased automation to cause heavy displacement of railway workers.

Private automobiles handled about eighty-five per cent of intercity passenger traffic in 1950, the airways two per cent, and the railways eight per cent.[24] In 1957, the rails and airways had about four per cent each, and private automobiles about eighty-nine per cent of intercity travel.[25] Local transit has been even more affected by increased use of private automobiles, but no measurement of that local use has been made. Passengers carried by local transit facilities have declined approximately fifty per cent since 1950. Railway and local transit phases of this situation overlap in the commuter service operated into the largest cities by the railroads.

Passenger service differs from freight service and from manufacturing industry generally, in that technological change cannot increase its output per employee man-hour to the same degree. Passenger service is inescapably personal and individual. Progress in vehicles, power, accounting procedures, ticket machines, and station operation only makes more clear the fact that there can be relatively little reduction in the number of transportation employees per thousand passengers, unless volume increases substantially. Consequently, as wages rise—and they must go up with the general wage level—passenger costs rise. Those costs must be met from increased passenger revenues, or some other source must be found for funds to meet increasing expenses.

In the private-transit section of this problem, part of the difficulty is that longer hauls per passenger, resulting from outward movement of population in the cities, can only within narrow limits be met by increased fares; increasing general fares to meet higher average expense per passenger places an undue part of the cost on those riding short distances. But in the larger cities, mass transportation is vitally necessary if central business districts are to be kept alive. Traffic congestion is only increased by improving access of private automobiles to the central areas through freeways or other street and highway development. The need for local transit service for community purposes—transportation of school

[24] ICC, 65TH ANN. REP. 20 (1951).
[25] ICC, 72D ANN. REP. 10 (1958).

children, for instance—cannot otherwise be met. These and related considerations have resulted in various kinds of subsidies for mass transportation in the larger cities; and in seven of these principal metropolitan areas, the facilities are now publicly owned and operated.[26]

In the railway section of this general passenger problem, the managements claim that passenger service is operated at a deficit, made good out of freight revenues. The accuracy of that statement depends upon the method of accounting for the joint operations of the industry, but there can be no doubt that passenger service is less remunerative than freight service. Railway companies try to increase net passenger revenues by reducing or discontinuing service that has a high ratio of expenses to revenues. There is evidence that some roads would prefer to discontinue all passenger service. Any such reduction or discontinuance of service has an immediate effect on railway employment.

State regulatory commissions have had, until last year, major responsibility for permitting or prohibiting reductions of railway passenger service, including commuter operations. Local communities to be adversely affected by such changes have joined with railway workers in urging that service be maintained. Although very great reductions have been authorized by state commissions, the railways have felt that greater freedom should be given them. Railway officials in 1958 asked Congress to amend the Interstate Commerce Act so as to give final authority in any proposed reduction of service to the Interstate Commerce Commission. Congress, in the Transportation Act of 1958, granted that request; state commissions now have greatly reduced control over even intrastate railway service as a result of that law.[27]

It has already become clear that the operation of the new provisions of the Interstate Commerce Act will intensify the railway unemployment problem. The Commission has, and has exercised, the right in approving abandonments of service to attach conditions requiring a carrier to protect railway employees adversely affected. The conditions that have come to be considered standard under such circumstances are the "Burlington conditions," imposed by the Commission in *Chicago, B. & Q. R. Co. Abandonment*.[28] They include monthly supplementary or unemployment allowances to employees, continuance of employee rights during furlough, payment of moving costs to employees forced to move to retain employment, and reimbursement for losses by employees forced to sell homes. These particular conditions, attached to railway abandonments, are only a specific application of principles that have for years been given general acceptance by collective bargaining, by law, and by Commission action where proposed railway changes affected employees adversely. But in a decision under section 13a of the Interstate Commerce Act (added by the Transportation Act of 1958), the Commis-

[26] New York, Chicago, Los Angeles, Boston, Detroit, Cleveland, and San Francisco.
[27] 72 Stat. 571, 49 U.S.C.A. § 13a (Supp. 1958).
[28] 257 I.C.C. 700 (1944).

sion has now ruled that in the discontinuance of single trains, it does not have the power to impose conditions for the protection of employees.[29] The resulting unemployment, in the one action, will be small; but to railway employees generally, the action of the Commission will be a major defeat and will threaten heavy future losses.

So far as the commuter aspects of the general railway program to curtail passenger service is concerned, it seems likely that some method of subsidy will be developed to secure continued operation. The problem is serious only in a relatively few large cities. One of those cities granted a temporary subsidy to one railroad, pending study and final action on the whole question.[30] Different approaches will doubtless be used in different cities, some of them perhaps including public operation of commuter rail service as an adjunct to local transit facilities already publicly-owned.

But the discontinuance of passenger and other rail service under the new provisions of the Interstate Commerce Act may add greatly to an unemployment situation already acute. More than 200,000 railway workers were on the unemployment rolls in the later months of 1958, 80,000 more than in the same period of 1957. There were 140,000 drawing unemployment benefits in September, a month normally of high employment. Quantitatively this is a critical situation.[31]

Moreover, the quality of railway unemployment is as disturbing to the employees as the quantity. A detailed study of unemployment, made for the twelve-year period 1946-58, analyzed the character of that unemployment. Of 308,000 who received unemployment compensation in the benefit year 1957-58, 147,000 were over forty years of age. These older employees averaged more than eight weeks of unemployment compensation. Relative unemployment of senior employees was much greater in 1957-58 than it had been in earlier years, and a greater proportion of the older unemployed exhausted the benefits to which they were entitled. Yet, the carrier employment policies seemed to have been established without regard to that situation.[32] In the calendar year 1957, the carriers hired 95,000 new employees without previous experience in the industry,[33] while 270,000 were being separated and 75,000 were unemployed long enough to exhaust their benefits,[34] more than half of those

[29] Great Northern Ry. Co. Discontinuance of Service, Williston, N.D.—Watford City, N.D.—Richey, Mont., ICC, No. 20348, Feb. 6, 1959. *Cf.* Traffic World, Feb. 11, 1959, p. 1; Railway Age, Feb. 16, 1959, p. 14.

[30] The N.Y., N.H. & H. R.R. was authorized to abandon its Old Colony Line in Massachusetts. The Special Legislative Railroad Commission recommended that the company be paid $900,000 a year subsidy to keep the Old Colony line in service—the City of Boston to provide $250,000 and remainder to be levied on 37 communities along the line. The state legislature and the courts approved the recommendation, and it was made effective. On July 1, 1959, the Old Colony Line was abandoned; however, a section from Boston to Braintree (10 miles) was purchased by the Commonwealth of Massachusetts under authority of an act of the legislature, with the governor's approval. Moody's Transportation, July 18, 1958, p. 1317; *id.*, July 4, 1958, p. 1338; *id.*, July 1, 1958, p. 1345; Passenger Transport, Sept. 4, 1959, p. 3.

[31] Railroad Retirement Board Monthly Review, Dec. 1958, p. 15.

[32] See statement from Office of Director of Research, Railroad Retirement Board, March 1, 1957.

[33] RAILROAD RETIREMENT BOARD ANN. REP. 204, table E-2 (1958).

[34] *Id.* at 186, table D-27.

over forty years of age.[35] There is no record of those who found nonrailroad employment before exhausting their benefits.

The Railroad Retirement Board, administering the Railroad Unemployment Insurance Act,[36] maintains a placement service and exerts all possible effort to persuade the carriers to hire experienced railroad men from among the unemployed. Those efforts have been attended with only slight success; in 1956, 27,000 unemployed claimants were placed,[37] while the roads were hiring 140,000 employees without railway experience.[38] There has been a little improvement in recent months, but placement is still a small fraction of separations or of natural turnover.

Railway unemployment is a function, in part, of seasonal fluctuations, which railway employees consider to be susceptible of great reduction, with increased over-all efficiency, if management policies were changed. Part of railway unemployment results from the unification of facilities on individual roads or between railroads. Another part of the total is due to changes in equipment or processes, including automation, itself made more possible by consolidation of railroad offices or other facilities. Employment could be reduced over a long period, without unemployment, through natural turnover, if displaced employees were given positions made vacant by deaths, retirement, or resignation. This has been the basis of railway labor unemployment proposals for at least thirty years.

Railway employees have three approaches to this compound unemployment problem. It is a cardinal principle in both union and governmental railway labor policy that the savings resulting from unifications, consolidations, or similar changes should be used, in part, to cushion the effect of the resulting unemployment. This principle was written into the Emergency Railroad Transportation Act of 1933.[39] It is embodied in the "Washington Agreement of 1936" between managements and unions,[40] in the Interstate Commerce Act,[41] and in many decisions of the ICC, even where the statutory requirement is not definite.[42] Application of the principle includes allowance for the fact that many railway workers are employed in small towns, where there is no other employment, but where railway service has required skilled workers. In such towns, homes are often not for rent, and many railway employees have had to buy or build their own. When railroad reshuffling moves a service or a facility from such a town, the

[35] *Id.* at 185, table D-26.

[36] 52 Stat. 1094 (1938), 45 U.S.C. §§ 351-67 (1952).

[37] See statement by Bureau of Unemployment and Sickness Insurance, Railroad Retirement Board, March 1, 1957.

[38] See RAILROAD RETIREMENT BOARD ANN. REP. 178, table D-2 (1957).

[39] 48 Stat. 211 (expired June 17, 1936).

[40] *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 2531, Omnibus Transportation Bill*, 76th Cong., 1st Sess. pt. 2, at 231-41 (1939).

[41] 24 Stat. 380 (1887), as amended, 49 U.S.C. § 5(2)(f) (1952).

[42] *Cf.* United States v. Lowden, 308 U.S. 225 (1939); ICC v. Railway Labor Executives Ass'n, 315 U.S. 373 (1942); Railway Labor Executives Ass'n v. United States, 339 U.S. 142 (1950); The New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952).

employees must move, transporting their families and household goods, and selling their homes at whatever price they will bring in a collapsing real estate market. Railway workers have been able to get some degree of protection under such circumstances by the methods mentioned above. Their concern now is greatly heightened by the fact that the "Washington Agreement" needs extension to cover today's problems, and the recent amendment to the Interstate Commerce Act relative to abandonments or curtailments of service is a drastic change in government policy.

The two approaches, through direct collective bargaining or through legislative and ICC protection of displaced workers, tie in with the third course open to railway workers. The Railroad Unemployment Insurance Act now provides compensation up to $8.50 per day for not more than twenty-six weeks in a benefit year.[43] The cost of unemployment compensation is borne entirely by the carriers, and the payroll tax to meet the cost may rise or fall with the volume of unemployment. The Act is administered by the Railroad Retirement Board, one of the three members of which, by law, must be chosen from among persons named by the unions, and one from among management nominees.

Congress has recently enacted a statute that extends the period during which unemployment compensation will be paid to senior employees, and increases the compensation from the present fifty per cent to sixty per cent of the employee's earnings, with a maximum of $10.20 per day.[44] Railway employees urged this legislation both as a measure of justice to displaced older workers, many of whom are highly skilled in railway service but without skill for any outside employment, and as an incentive to the carriers to rehire experienced senior employees rather than to recruit new workers from outside the industry.

This legislation and all other efforts by railway employees to deal with the grave unemployment crisis have run head-on into a national publicity campaign of unprecedented intensity by railway managements. In the closing months of 1957 and the first eight months of 1958, the carriers experienced a recession in traffic and revenues somewhat more than proportionate to the national decline. Recovery has been marked since September 1958. That is a standard, recurrent situation; any general drop in business brings about a drop in railway traffic of a little greater size, because inventory adjustment invariably means that the movement of goods drops more than either production or sales. On the other hand, as industries build inventories, with mounting business activity, more goods are transported than are currently being produced or sold. During each of the brief postwar recessions, railway management statements have seemed to indicate a belief that complete, final disaster was upon them. Demands for governmental assistance and vigorous attacks upon employees have marked each of those

[43] 69 Stat. 716 (1955), 45 U.S.C. § 352 (Supp. V, 1958).

[44] 73 Stat. 30, 45 U.S.C.A. §§ 351, 352 (1959).

temporary dips in rail revenues. But the current campaign has been carried to lengths far greater than the 1949 or 1953 publicity drives.[45]

One aspect of this current publicity that threatens serious conflict is the demand for specific changes in the working rules of operating employees.[46] Those rules were set up, for the most part, before World War I. They govern an incentive wage system. Many industries had such systems in the early years of this century, and at that time, the railway practices were no doubt as favorable to the employees as any in existence. Since then, railway technological change has combined with the improvement of incentive wage systems to make the railway rules appear inappropriate and out of adjustment. Significant movements for revisions were undertaken by operating employees in 1943, 1953, and 1955. Union requests for modification of parts of the wage structure were, in general, approved in each of those movements. The carriers have asked for changes in recent years, but have abandoned their proposals during collective bargaining. Current carrier publicity makes much of the fact that the standard task of railway road-service men is expressed in terms of hours and days, and that it is an apparent anachronism to say that 100 miles is an eight-hour day's work. Other apparent anachronisms in the wage structure of operating men have less publicity appeal. But a thorough study of the rules under which the incentive wage system functions will show many particulars in which railway operating men have been less favored than workers under other incentive wage systems.

Total employment on Class I carriers was over 2,000,000 in 1920,[47] 1,500,000 in 1930,[48] and 1,250,000 in 1950.[49] The lowest annual average, until now, had been the 1938 figure of 939,000.[50] In December 1956, there were 1,016,000 railway employees; in December 1957, 919,000;[51] and in December 1958, 824,000.[52] In 1957, the railways handled thirty per cent more traffic than in 1929, with forty per cent fewer employees; hence, the output per man-hour was 150 per cent greater in 1957 than in 1929.[53] Employment today is lower than it has been at any time in this century; man-hour productivity, at an all time peak.

Some comparative figures for other industries are available. From 1939 to 1953, man-hour productivity in all United States manufacturing increased by

[45] *Management 'Featherbed'?*, Railway Age, Feb. 23, 1959, p. 10; Wall Street Journal, Oct. 14, 1959, p. 4; *id.*, Oct. 19, 1959, p. 12; *id.*, Oct. 27, 1959, p. 27. Similar advertisements have been carried in daily and weekly newspapers throughout the United States since the February 23d inauguration of the campaign.

[46] *Management 'Featherbed'?*, Feb. 16, 1959, pp. 9, 13.

[47] ICC, STATISTICS OF RAILWAYS IN THE UNITED STATES xix (1920).

[48] *Id.*, table 63, at S-53 (1930).

[49] ICC, TRANSPORT STATISTICS IN THE UNITED STATES pt. 1, table 63, at 48 (1957).

[50] See note 48 *supra*.

[51] ICC, STATEMENT No. M-300, WAGE STATISTICS OF CLASS I RAILROADS (1957).

[52] Number of Employees at Middle of Month, ICC Preliminary Release, Dec. 1958.

[53] ICC, STATEMENT No. 25, STATISTICS OF RAILWAYS IN THE UNITED STATES, PRODUCTIVITY AND TRAFFIC xlix (1929); *id.*, STATEMENT No. 16, STATISTICS OF RAILWAYS IN THE UNITED STATES, EMPLOYMENT xxxvi (1929); *id.*, TRANSPORT STATISTICS IN THE UNITED STATES table 44, at 30 (1957); *id.*, table 63, at 48.

twenty-eight per cent;[54] man-hour productivity of railway workers increased by fifty-nine per cent.[55] From 1947 to 1957, real product per man-hour in nonfarm industry rose 28.6 per cent;[56] railway output rose 46.3 per cent per man-hour.[57] These railway data include all traffic, passenger as well as freight.

The resentment felt by railway workers over the widely disseminated charges of "featherbedding," when their man-hour productivity has far outrun employee productivity in American industry generally, is heightened by the seemingly indifferent attitude of the carriers toward the heavy volume of railway unemployment. Railway employees also feel that the carriers' tactics have seriously crippled grievance procedures under the Railway Labor Act and have compounded the offense by forcing into its creaking compulsory arbitration machinery disputes of a kind that should be handled under other sections of the Railway Labor Act.

The railway labor situation is critical, more so now than it has been for perhaps a quarter century. Current wage agreements became subject to change as of November 1, 1959.[58] Legislation affecting railway unemployment compensation is also at a critical stage. Carrier publicity has angered railway employees, arousing a great deal of bitterness, and the success of carrier demands for freedom in reducing service without regard for displaced employees will heap more fuel on that fire. The announced carrier intention to ask amendment of the working rules in ways that will adversely affect employment is explosive, particularly the proposal to run American freight trains and switch engines with only one man in the locomotive cab. It is not too much to say that war has been declared by the railway managements; it seems unlikely that anything which can be done by way of new legislation or by improved administration of that now on the statute books can avert a major crisis if the railways persist in their announced program.

Conclusion

Apart from any specific legislation aimed at any part of the railway or other transportation labor problems, it should be kept in mind that any changes in regulation of transportation will have a more or less direct effect upon employment and labor relations. The paradox of close governmental regulation of the industry and simultaneous government dedication to "free private competitive enterprise" makes it difficult to predict what form the transportation policy of the future will take. Railway managements again are urging their program of whole-

[54] U.S. Bureau of Labor Statistics, Dep't of Labor, Rep. No. 100, Trends in Output Per Man-Hour and Man-Hours Per Unit of Output, Manufacturing, 1939-53, table 4, at 315 (1955).

[55] *Id.*, Rep. No. 105, Trends in Output Per Man-Hour, 1935-55, table 6, at 8 (1956).

[56] U.S. Bureau of Labor Statistics, Dep't of Labor, Comparison of Indexes of Labor and Non-labor Payments, Prices, Real Earnings, and Productivity for the Private Nonfarm Sector of the Economy, 1947-57, at 2 (1958).

[57] Statistical Abstract table 281, at 226 (1958).

[58] Formal requests for wage increases have been served by organizations representing all railway employees, and railway managements have countered with proposals for wage decreases. Management has also proposed drastic changes in virtually all basic working rules of the operating employees. Railway Age, Nov. 2, 1959, p. 9.

sale consolidations. The late Mr. Joseph B. Eastman, Federal Coordinator of Transportation under the Emergency Railroad Transportation Act of 1933, and for many years a leading member of the ICC, seemed to favor integration of various types of transportation around a unified and public-owned railway system. Whether or not this may be the basis of transportation policy at some time in the future, it has no substantial support now among labor, management, government officials, or the general public.

Whatever may be the form of national transportation policy, it should recognize the fact that the need for adequate, efficient, and economical service can be met only if employee morale can be maintained. That, in turn, requires that transportation wages and working conditions progress in step with those in American industry generally and that the industry's technological readjustments be handled so as to impose a minimum of avoidable hardship upon the employees. Railway workers, by their responsible and intelligent attitude toward their own and the industry's problems, have earned and have been given the right to participate in determining transportation policy. That right should not now be curtailed; on the contrary, it should be extended to other groups of transportation workers as their organizations demonstrate the requisite responsibility.

THE AIRLINES' RECENT EXPERIENCE UNDER THE RAILWAY LABOR ACT

Arthur M. Wisehart*

Introduction

No reader of newspapers need be told that the recent past has been eventful from a labor relations point of view in the air transport industry, and many travelers by air can recount vivid personal experiences illustrative of travel problems and inconvenience caused by strikes on the airlines.[1] This article describes factors underlying these disturbances, outlines the applicable labor laws, and summarizes recent developments. First in order, however, is a brief description of those aspects of the air transport industry having a particular bearing on its labor relations:

A. Strikes are especially crippling to the airlines. Air carriers deal in services, not goods. Consequently, they cannot build up inventories to provide revenue or forestall loss of trade when a strike occurs. Moreover, as transportation is provided continuously, an interruption of service affects the public immediately.[2]

B. Since the transportation provided is national and international, as well as local, airline operations take place in a variety of labor markets.

C. The industry is relatively new and dynamic, having a rapidly changing technology. Although its routes, fares, and operations are subject to governmental regulation, it is highly competitive. Competition has been sharpened by the Civil Aeronautics Board's policy of establishing parallel routes. One aspect of competition is the race to acquire and put new equipment into operation. The new equipment entails high capital expenditures and brings about a rapid rate of obsolescence.

D. The jobs performed by the organized employees run the gamut of specialization, from highly-trained pilots to relatively untrained employees performing cleaning services.

E. The employees are organized on a "class or craft" basis, so that each carrier must deal with a number of unions.

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[1] Airline strikes forced the cancellation or disruption of travel plans of over 2,500,000 passengers in 1958. Moreover, airline employees lost more time due to strikes in 1958 than in the previous 20 years combined. Air Transport Association of America, Air Transport Facts and Figures 4 (20th ed. 1959). The injury from strikes does not, of course, include the harassment from numerous strike threats. See the tabulations of strikes and strike threats in Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Joint Brief of the Airline Parties, CAB, 1959, tables 3 and 4.

[2] The situation is similar in other service industries. See Levinson, *Railway Labor Act—The Record of a Decade*, 3 Lab. L.J. 13 (1952); Tower, *Labor Relations in the Broadcasting Industry*, 23 Law & Contemp. Prob. 62, 63 (1958).

I

FACTORS UNDERLYING RECENT LABOR DISTURBANCES

The introduction of jet aircraft has been a key factor in recent airline labor relations problems. Because of increased capacity, the new equipment has given rise to alleged fears of technological unemployment, a specter periodically raised by airline unions since the beginning of air transport services.[3] These allegations supplied arguments used to support the demands of the mechanics for severance pay and a large wage increase, and the demands of the pilots that they be given the jobs of the flight engineers or, in the alternative, that an additional pilot be put in the cockpit of jets.[4] The flight engineers, of course, put up a strong defensive struggle to retain their position.[5]

In the past, because of technological improvements and continued growth, the air transport industry expanded very rapidly[6] and was able to absorb increasing costs.[7] Recently, however, costs have begun to outstrip growth,[8] and just when capital requirements for new equipment became highest, profits dipped.[9]

In 1956, a general passenger fare investigation was inaugurated by the CAB.[10] Although it has dragged on for four years without a final decision, an interim fare

[3] Past experience in the industry has not supported claims of technological unemployment. See note 6 *infra*.

[4] See E. B. McNATT, LABOR RELATIONS IN THE AIR TRANSPORT INDUSTRY, 1947-1957, at 20-21 (1958). Recent settlements provide for three pilots and a flight engineer in the cockpit of turbojet aircraft. Piston aircraft were operated with two pilots and a flight engineer. A description of the historical and functional relationship between flight engineers and pilots is contained in the reports of PRESIDENTIAL EMERGENCY BOARD No. 120, REPORT (1958); PRESIDENTIAL EMERGENCY BOARD No. 121, REPORT (1958).

[5] For a report of continuing friction, see N.Y. Times, March 16, 1959, p. 53, col. 1. The Wall Street Journal for March 11, 1959, p. 1, contains a report of various personnel problems and complaints resulting from the introduction of jet aircraft.

[6] The growth of the air transport industry is depicted in the following chart from AIR TRANSPORT ASSOCIATION OF AMERICA, *op. cit. supra* note 1, at 8:

THE AIRLINE STORY
Ever Increasing Usefulness Over the Years

All classes of Certificated Air Carriers	1939	1949	1958	All classes of Certificated Air Carriers	1939	1949	1958
Number of Airlines	23	45	55	Total Airline Payrolls	$24,000,000	$349,000,000	$950,000,000
Cities Served (excluding Alaskan points)[2]	286	638	703	U. S. Mail Ton Miles	8,610,000	61,144,000	177,420,000
Aircraft in Service	347	1,083	1,900	Number of Passengers Carried	1,864,000	16,723,000	49,075,000
Seats Available (Daily)	5,100	35,900	103,700	Average Fare	5.62¢	6.23¢	5.8¢
Cruising Speed of Fastest Transport	220 mph	315 mph	590 mph	Ton Miles of Freight Carried	2,713,000[1]	112,500,000	501,891,000
Number of People Employed	13,300	76,000	146,000				

[1] Freight and Express combined.
[2] Early figures for Alaska not available but in 1958 there were 268 points served.

[7] For a discussion of this, see Suspended Passenger Fare Increase Case, No. 8613, Order No. E-11812, CAB, Sept. 25, 1957, pp. 17-29, particularly charts 1, 2, and 4(a)-(d).

[8] See Interim Fare Increase Case, No. 9288, Order No. E-12203, CAB, Feb. 25, 1958, p. 7.

[9] *Id.* at 5-6, and app. C.

[10] General Passenger Fare Investigation, No. 8008, Order No. E-10279, CAB, May 10, 1956.

increase was granted[11] and surcharges for jet service have been authorized.[12] Despite constantly improving service and higher costs, the average fare paid by the passenger for air transportation has not increased in the postwar period—partly because of the introduction of coach service in 1948.[13]

In 1957 and 1958, the financial picture looked particularly bleak, and while the results for the end of 1958 and for 1959 have shown improvement, there is no clear indication that the airlines are out of the woods yet.[13a]

These financial pressures have resulted in part from the demands of employee groups. As shown in appendix A at the end of this article, the increases in average pay of mechanics during the past twelve years have substantially exceeded increases in the Consumer Price Index plus an annual productivity factor, and this has not been passed on to the consumer. Recent settlements have brought the pay level of mechanics even higher. Similarly, as a result of negotiations recently concluded, a senior pilot's compensation may run up to $33,000 per year, exclusive of substantial fringe benefits including, in some cases, more than two weeks' free time at home every month.[14]

These, then, are salient factors presently affecting the labor relations of the airlines. Having them in mind will make more meaningful some of the aspects of the Railway Labor Act discussed in the next section.

II

THE OPERATION OF THE RAILWAY LABOR ACT

A. Legislative Background

The Railway Labor Act was passed in 1926 to regulate the labor relations of the railroads.[15] It is developed from earlier legislation dating back to 1888.[16] In 1934, its

[11] Interim Fare Increase Case, No. 9288, Order No. E-12203, CAB, Feb. 25, 1958.

[12] See Additional Charges Proposed by American Airlines, Inc. for Boeing 707 Jet Aircraft, No. 10142, Order No. E-13395, CAB, Jan. 16, 1959, and *id.*, Order No. E-13417, Jan. 22, 1959, in which the Board states that the extra charge is not for jet service as such, but for the "more deluxe type of service."

[13] See note 6 *supra*. App. A contains an indication of the trend in revenue-mile yields since 1948.

[13a] In General Passenger Fare Investigation, No. 8008, Initial Decision, CAB, May 27, 1959, pp. 167, 177, Examiner Ralph L. Wiser concluded that "the domestic trunkline air-transport industry failed to earn a fair return in 1957 and 1958 by any reasonable standard of consideration," and that "in 1957 and 1958, both yearly and 5-year averages of profits were well below a reasonable level."

[14] See Sheehan, *What's Eating the Airline Pilots?*, Fortune, April 1959, pp. 122, 123. Historically, one reason for the high level of pilot compensation was the expectation that they would be compelled to retire at a comparatively early age. In PRESIDENTIAL EMERGENCY BOARD No. 36, REPORT 11, 12 (1946), for example, it is stated that "Expert evidence indicates that the active flying life of an air-line pilot may extend up to 50 years. . . . [While] flying careers may be longer than generally believed . . . the chance of continuing beyond 50 is doubtful." That emergency board proceeding involved problems in the transition from two to four-engine equipment in 1946. Before World War II, it was thought that pilots would have to end active flying even sooner. That has not proved to be the case in practice. At present, there are a number of airline pilots over 60; and, in fact, two adjustment boards recently ruled that a carrier could not impose a compulsory retirement age of 60 on its pilots. An action for a declaratory judgment that such a ruling is erroneous and void has been commenced by Western Air Lines against the Air Line Pilots Association in the United States District Court for the Southern District of California.

[15] 44 Stat. 577, 45 U.S.C. §§ 151-63 (1952). The constitutionality of the prohibition against inter-

procedures for dealing with certain types of disputes were strengthened.[17] The Act was made applicable to the airlines by the addition of title two in 1936.[18] There have been no statutory changes since then, other than an amendment in 1951 authorizing union-shop agreements and the check-off of union dues.[19]

B. Coverage

The Act covers air and rail carriers in interstate commerce,[20] including state-owned railroads[21] and foreign carriers with employees based in the United States,[22] whether the services performed are directly connected with transportation or not.[23] It does not cover employees based in foreign countries.[24] "Subordinate officials" are included in the definition of "employees."[25]

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ference with union organization was upheld in Texas & New Orleans R.R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 570 (1930). Although the Act had the approval of representatives of both the railroads and the unions, House Comm. on Interstate and Foreign Commerce, *Railway Labor Disputes*, H.R. REP. No. 328, 69th Cong., 1st Sess. (1926), Donald Richberg and David Lilienthal, his associate, have been referred to as its draftsmen.

[16] 25 Stat. 501 (1888); Erdman Act, 30 Stat. 424 (1898); Newlands Act, 38 Stat. 103 (1913); Adamson Act, 39 Stat. 721 (1916); General Order No. 8 (Feb. 21, 1918); Transportation Act of 1920, 41 Stat. 469. These earlier statutes are summarized in NATIONAL MEDIATION BOARD, ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD, 1934-1957, app. B (1958) [hereinafter cited as NMB REPORT]; and the circumstances of their passage, as well as the passage of Railway Labor Act, are described in LEONARD A. LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION 14-46 (1955).

[17] 48 Stat. 1185, 45 U.S.C. § 151 (1952). See LECHT, *op. cit. supra* note 16, at 73. The constitutionality of an enforceable duty to bargain was upheld in Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 553, 557 (1937).

[18] §§ 201-08, 49 Stat. 1189, 45 U.S.C. §§ 181-88 (1952).

[19] § 2, Eleventh, 64 Stat. 1238, 45 U.S.C. § 152, Eleventh (1952). The check-off provision relates to "any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), holds that the amendment is constitutional and that it pre-empts state right-to-work laws. In International Ass'n of Machinists v. Street, 108 S.E.2d 796 (Ga. 1959), from which an appeal is pending to the United States Supreme Court, it was held that a union-shop agreement under the Railway Labor Act violated constitutional rights if the dues collected were used to foster programs and ideologies opposed by some of the employees.

[20] § 1, First, 49 Stat. 1191 (1936), 45 U.S.C. § 151 (1952).

[21] California v. Taylor, 353 U.S. 553 (1957).

[22] See Rutas Aereas Nacionales, S.A. v. Edwards, 244 F.2d 784 (D.C. Cir. 1957); Decker v. Linea Aeropostal Venezolana, 258 F.2d 153 (D.C. Cir. 1958).

[23] See Biswanger v. Boyd, 40 L.R.R.M. 2267 (D.D.C. 1957), and NMB Case Nos. C-2505 (1956) and R-3321 (1959). But Northwest Airlines, Inc. v. Jackson, 185 F.2d 74 (8th Cir. 1950), *cert. denied*, 342 U.S. 812 (1951), holds that employees not engaged in transportation activities are not within the overtime pay exemption for Railway Labor Act employees in § 13(b)(3) of the Fair Labor Standards Act, 52 Stat. 1067 (1938), as amended, 63 Stat. 917 (1949), 29 U.S.C. § 213 (1952). The NLRB follows a policy of not asserting jurisdiction in doubtful cases unless it has been declined by the NMB. See Northwest Airlines, Inc., 47 N.L.R.B. 498 (1943); Pan American World Airways, Inc., Guided Missiles Range Division, 115 N.L.R.B. 493 (1956); Interior Enterprises, Inc., 122 N.L.R.B. No. 180 (1959). See Fenton, *The Taft-Hartley Act and the Airlines Industry*, address before the Personnel Relations Conference of the Air Transport Association, Oct. 1, 1958.

[24] Airline Dispatchers Ass'n v. NMB, 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951); Air Line Stewards and Stewardesses Ass'n v. Northwest Airlines, Inc., 269 F.2d 170 (8th Cir. 1959); and Airline Stewards and Stewardesses Ass'n v. Trans World Airlines, Inc., 173 F. Supp. 369 (S.D.N.Y. 1959) (appeal pending). For a summary of the NMB's views concerning jurisdictional problems, see NMB REPORT 6-8.

[25] § 1, Fifth, 44 Stat. 577 (1926), 45 U.S.C. § 151 (1952). In Case No. R-2107 (1949), the NMB held that mechanical foremen are "employees" for the purposes of the Act, but Case No. C-2783 (1959)

Air and rail carriers may seek protection against secondary boycotts under section 8(b)(4)(A) of the National Labor Relations Act,[26] but prior to the passage of the Labor Management Reporting and Disclosure Act of 1959,[26a] it was problematical whether relief would be afforded.[26b] One of the purposes of the new law is to make the secondary boycott prohibitions clearly applicable to such carriers and their employees.[27]

C. Representation

The Railway Labor Act protects employees in the selection of bargaining representatives;[28] and the National Mediation Board, charged with settling representation disputes,[29] interprets this protection as requiring it to promote the organization of employees.[30] One curious manifestation of this interpretation is that the NMB representation election ballots contain no space for a negative vote.[31] Consequently, employees not wishing union representation must either not vote or vote an invalid ballot by marking "No Union" on it.[32]

Before conducting an election, the NMB determines the system-wide "class or

indicates that such employees are not included within the scope of an airline mechanics certification. The application of the Act to middle management personnel is criticized in Dale & Raimon, *Management Unionism and Public Policy on the Railroads and the Airlines*, 11 IND. & LAB. REL. REV. 551 (1958). By way of contrast, the National Labor Relations Act excludes "any individual employed as a supervisor." § 2(3), 61 Stat. 138 (1947), 29 U.S.C. § 152 (1952).

[26] 49 Stat. 452 (1935), 29 U.S.C. § 158(b)(4)(A) (1952). See Local Union No. 25, Teamsters v. New York, N.H., & H. R.R. Co., 350 U.S. 155 (1956).

[26a] 73 Stat. 519, 29 U.S.C.A. §§ 401-531 (Supp. 1959).

[26b] The NLRB took the position that § 8(b)(4)(A) did not protect carriers from secondary boycotts. See Local No. 1205, Teamsters, 122 N.L.R.B. No. 148 (1959). Some of the courts did not agree with this position, however, nor did the NLRB general counsel. See W. T. Smith Lumber Co. v. NLRB, 246 F.2d 129 (5th Cir. 1957); Knapp v. United Steelworkers of America, 38 CCH Lab. Cas. ¶ 65,806 (D.C. Minn. 1959).

[27] Labor Management Reporting and Disclosure Act of 1959, § 704(a), 73 Stat. 525, 29 U.S.C.A. § 158(b)(4)(A) (Supp. 1959), does this by changing "employer" to "person." See S. REP. No. 187, 86th Cong., 1st Sess. (1959). Title VII of this Act, which amends the Labor Management Relations Act of 1947, 61 Stat. 136 (codified in scattered sections of 29 U.S.C.), is otherwise inapplicable to Railway Labor Act industries, but the other 6 titles are. Those titles contain a "bill of rights" for union members; reporting requirements for employers, unions, and labor relations consultants; provisions relating to union trusteeships, elections, and fiduciary duties; and miscellaneous matters.

[28] § 2, Third and Fourth, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1952).

[29] *Ibid.* Since that section refers to a representation dispute "among a carrier's employees," the NMB takes the position that carriers may not institute or be a formal party in such proceedings, although it may "in its discretion hold a public hearing . . . at which the carrier concerned is usually invited to present factual information." NMB REPORT 4, 19. As a consequence, no means is afforded whereby the employer can directly challenge the majority status of a union seeking to bargain or protect itself against jurisdictional disputes. Under the amended National Labor Relations Act § 9(c), 61 Stat. 143 (1947), 29 U.S.C. § 159(c) (1952), employers are expressly given the right to petition for an election. For criticism of the absence of a similar provision in the Railway Labor Act, see Dale & Raimon, *supra* note 25, at 571.

[30] See NMB REPORT 15.

[31] *Id.* at 19.

[32] The NMB requires that a majority of the eligible employees cast valid ballots in order for a union to be certified as a bargaining agent. See § 2, Fourth, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1952). Ballots marked "No Union" are considered void, so are not counted toward the majority of valid ballots required. See NMB REPORT 16-18; NMB Case No. R-3273 (1958).

craft" of employees to be represented.[33] What constitutes a craft or class is a difficult question in some cases,[34] and the Board has placed a narrow interpretation on its authority to make such determinations.[35] Because of the class or craft criterion for the organization of bargaining units, a carrier may have to deal with more than half a dozen different unions having a variety of differing objectives.[36]

Once a bargaining agent has been designated by the Board (or recognized by the carrier without an election), disputes between the union and carrier fall into two categories, in the parlance which has developed under the Railway Labor Act. Controversies over rates of pay, rules, or working conditions in the negotiation of a new contract are referred to as "major" disputes; these are distinguished from "minor" disputes, which involve employee grievances or the interpretation or application of an effective agreement.[37] Consistent with its primary purpose of "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein" within the framework of collective bargaining,[38] the Act has elaborate machinery for the settlement of both types of disputes, as described in the next two sections.

D. Minor Disputes

Minor disputes usually are processed through three steps and then, if unresolved, are submitted to an adjustment board for a "final and binding" award.[39]

The National Railroad Adjustment Board processes railroad minor disputes. It is a permanent body of thirty-six members divided into four divisions. The railroads and the unions "national in scope" each designate half of the members. Each division has jurisdiction over disputes involving specified categories of employees.[40] Although title two of the Act authorizes a National Air Transport Adjustment Board for air carriers,[41] it has never been established.[42] Instead, it is customary for the air carriers' working agreements to provide for system boards of adjustment having a similar jurisdiction.[43] Such boards have representatives of both the carrier and union, but

[33] § 2, Ninth, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1952). (This also varies from the National Labor Relations Act, where an "appropriate" unit under § 9, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(b) (1952), may be an "employer unit, craft unit, plant unit, or subdivision thereof.") This section authorizes the NMB to "appoint a committee of three neutral persons who after hearings shall within ten days designate the employees who may participate in the election." This procedure was used for the first time when, on Nov. 17, 1959, the Board appointed such a committee in connection with the Air Line Pilots Association petition to represent "flight deck crew members" of United Air Lines. NMB File No. 2946. This proceeding is another branch of the dispute between the pilots' and the flight engineers' unions.

[34] See NMB REPORT 19-22.

[35] *Id.* at 25. See NMB Case No. R-207 (1937). See also note 25 *supra*.

[36] As one observer has said (in an unpublished speech), "The multiplicity of contracting parties in the airline industry has all the disadvantages but, so far as I can see, none of the attractiveness of a harem. There is constant turmoil not only between the airline and its polygamous flock but also between the jealous rivals themselves."

[37] See Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U.S. 711, 722-24 (1945).

[38] § 2(1), 44 Stat. 577 (1926), 45 U.S.C. § 151a (1952).

[39] § 3(m), 44 Stat. 578 (1926), 45 U.S.C. § 153 (1952).

[40] *Ibid.*

[41] § 205, 49 Stat. 1190 (1936), 45 U.S.C. § 185 (1952).

[42] See NMB REPORT 29.

[43] § 204, 49 Stat. 1189 (1936), 45 U.S.C. § 184 (1952).

the disputes usually are settled by a neutral referee who is either agreed to by the parties or selected by the NMB. Neutrals chosen for the adjustment boards of air carriers function much like regular labor arbitrators. The NRAB, however, since it is a continuing body, has developed characteristics of its own.[44]

E. Major Disputes

As to major disputes, the parties first bargain without assistance following a thirty-day notice of opening on existing contracts.[45] If an impasse results, the NMB steps in, either on its own motion or at the request of either party.[46] Should agreement still not be reached, the Board proffers arbitration,[47] and if that is refused (as it usually is),[48] as a last resort the Board may (but need not) recommend the appointment of a presidential emergency board.[49] The emergency board makes an investigation, perhaps attempting to mediate the dispute itself, and then reports to the President. The parties are required to maintain the status quo[50] until thirty days have elapsed after the emergency board's report, following which the union may strike and the carrier may change conditions of employment and presumably hire replacements. Theoretically, the carrier also could resort to a lockout at that time, but as a practical matter—aside from competitive considerations—this is not feasible because of its obligations under unexpired contracts with other unions.

Major dispute proceedings often consume a great deal of time. The recent controversy between six air carriers and the International Association of Machinists is a case in point.[51] The agreements with the IAM expired on October 1, 1957. Approximately thirty days prior thereto the unions and companies exchanged proposals and began negotiating. Negotiations having proved fruitless, the services of

[44] For appraisals of the NRAB, see Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis*, 5 IND. & LAB. REL. REV. 365 (1952); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

[45] § 6, 44 Stat. 582 (1926), 45 U.S.C. § 156 (1952).

[46] §§ 5, 6, 44 Stat. 580-82 (1926), 45 U.S.C. §§ 155-56 (1952).

[47] § 5, 44 Stat. 580, 45 U.S.C. § 155 (1952).

[48] *E.g.*, 24 NMB ANN. REP. 25 (1958) lists only one major dispute arbitration for the air transport industry in 1957, and that did not involve the arbitration of an entire contract dispute. It originally was hoped that there would be "recourse to arbitration in practically every instance where the mediators cannot bring about an agreement." See testimony of Donald R. Richberg, in *Hearings Before the Committee on Interstate and Foreign Commerce on H.R. 7180, Railroad Labor Disputes*, 69th Cong., 1st Sess. 103 (1926). TWA and the stewardesses' union agreed in November 1959 to submit their major dispute to arbitrator David Cole.

[49] Under § 10, 44 Stat. 586 (1926), 45 U.S.C. § 160 (1952), the NMB notifies the President only if the dispute, in its judgment, threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," and the President then appoints the emergency board "in his discretion." During and after the 108-day strike by the pilots against Western Air Lines in 1958, there was considerable criticism of the NMB's failure to recommend the appointment of an emergency board.

[50] § 10, 44 Stat. 586 (1926), 45 U.S.C. § 160 (1952), provides that "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." Under § 5, 44 Stat. 580 (1926), 45 U.S. C. § 155 (1952), the parties may make "no change . . . in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" during mediation or for 30 days thereafter.

[51] The six airlines were Capital, Eastern, National, Northeast, Northwest, and Trans World.

the NMB were invoked, and continued for several months. The Mediation Board then proffered arbitration, which was refused, and on February 27, 1958, the President created Emergency Board Number 122 by executive order. That Board first met on March 11 for organizational purposes. Hearings commenced April 15, 1958 and continued for a total of sixty days thereafter, closing on July 29, 1958.

The Board (comprised of Howard A. Johnson, retired chief justice of the Supreme Court of Montana, as Chairman; Dr. Paul N. Guthrie, professor of labor economics at the University of North Carolina; and Francis J. Robertson, an attorney from Washington, D.C.) heard at length representatives of the parties and expert witnesses. Seven thousand, one hundred and sixty-two pages of testimony were taken, and approximately 970 exhibits, containing some 5,000 pages, were received in evidence. Following the hearings, the Board met with the parties informally in an unsuccessful attempt to bring about a settlement. It then produced a report and recommendations on September 15, 1958. That report contained 110 printed pages.[52]

The union had sought more and the carriers, less, than the Emergency Board recommended. The carriers, nevertheless, announced that they would accept the recommendations, but the IAM said merely that it would consider them as a "basis for further negotiations."[53] Negotiations thereupon continued for thirty days, and a series of strikes followed.[54] The ultimate settlements were substantially in excess of the Emergency Board's recommendations.[55]

The question arises as to just what the President is supposed to do after receiving a report from an emergency board. When the Railway Labor Act was passed, a great deal of pious confidence in the salutary effect of public opinion was expressed. In fact, Donald Richberg, counsel to the railroad unions and chief draftsman of the Act, stated that because of public opinion, it would be difficult for the parties not to accept emergency board recommendations.[56] In practice, however, such recommendations have not been the basis for settlement, but merely "a springboard from which [the unions] could obtain further concessions."[57] "For over a decade the significant collective bargaining developments have usually occurred after the report was issued and found unacceptable."[58]

As the NMB observed in 1953:[59]

> Means must be found to focus attention on the reports of Presidential emergency boards in such manner that they will afford the basis of settlements without further prolonged negotiations and threats of strike action, if not actual strikes. Otherwise, the role to be

[52] PRESIDENTIAL EMERGENCY BOARD No. 122, REPORT (1958).

[53] N.Y. Times, Sept. 20, 1958, p. 38, col. 7.

[54] Capital was struck 37 days; Eastern, 35 days; and Trans World, 16 days by the IAM. The strikes took place between Sept. 15, 1958 and the end of the year.

[55] The Emergency Board recommended an increase of approximately 23 cents per hour spread over 2 years, and the settlements were 44 cents over 3 years (the Northwest settlement was 41 cents).

[56] *Hearings, supra* note 48, at 18-19.

[57] JACOB J. KAUFMAN, COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY 154 (1954). See note 53 *supra*.

[58] LECHT, *op. cit. supra* note 16, at 6.

[59] 19 NMB ANN. REP. 7 (1953).

played by such boards in the settlement of disputes in the transportation industry, as envisioned by labor, management and the Congress at the passage of this Act will lose its vitality and value.

At one time, the President could seize the carriers to prevent interruption to vital transportation services,[60] but *Youngstown Sheet & Tube v. Sawyer*[61] cast doubt on his authority to do so in the absence of an emergency[62] or specific congressional approval.[62a]

F. "Other" Disputes

Several recent Railway Labor Act cases indicate that there are disputes which are neither major—since they do not involve rates of pay, rules or working conditions—nor minor—since they do not involve grievances or . . . the interpretation or application of agreements.[63] Such disputes apparently refer to matters specifically reserved to management as "subject to its continuing authority to supervise and direct the manner of rendition of [an employee's] service."[64]

Brotherhood of Railroad Trainmen v. New York Central R.R. Co.[65] holds that a controversy concerning the closing of railroad yards in Toledo falls into the "other" dispute category. The railroad, therefore, was not obligated to process it as a grievance or to bargain about closing the yards.[66] Moreover, as it was not considered a "labor dispute" under the Norris-LaGuardia Act,[67] the federal court was not ousted by that act of jurisdiction to issue an injunction.[68]

[60] See *In re* Debs, 156 U.S. 564 (1895).

[61] 343 U.S. 579 (1952).

[62] A 1916 statute gives the President authority in time of war to "take possession of all or any part of any system of transportation to transport troops, war material, and equipment, or for other purposes related to the emergency." 39 Stat. 645, as amended, 70A Stat. 266, 587 (1956), 10 U.S.C. §§ 4742, 9742 (Supp. V, 1958). See United States v. Brotherhood of Locomotive Engineers, 79 F. Supp. 485 (D.D.C.), *cert. denied*, 335 U.S. 867 (1948), *vacated and remanded for mootness*, 174 F.2d 160 (D.C. Cir.), *cert. denied*, 338 U.S. 872 (1949); United States v. Switchmen's Union of North America, 97 F. Supp. 97 (W.D.N.Y. 1950).

[62a] S. 80, 86th Cong., 1st Sess. (1959), introduced by Sen. Holland, of Florida, would have authorized the President to appoint a board of arbitrators for threatened airline strikes. The board could make binding awards on the issues in dispute, and strikes or lockouts would be prohibited. This bill has not been enacted.

[63] See note 37 *supra*.

[64] §§ 1, Fifth and 201, 44 Stat. 577 (1926), 49 Stat. 1191 (1936), 45 U.S.C. §§ 151, 181 (1952).

[65] 246 F.2d 114 (6th Cir. 1957), *cert. denied*, 355 U.S. 877 (1958).

[66] 246 F.2d at 118. *Cf.* Norfolk & Portsmouth Belt Line Ry. Co. v. Brotherhood of Railroad Trainmen, 248 F.2d 34 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958), where the issue was framed as a minor dispute, since the carrier had elected to treat it as such by instituting adjustment board proceedings.

[67] 47 Stat. 70 (1932), 29 U.S.C. § 101 (1952).

[68] An additional question considered by the court was whether there was any basis for federal jurisdiction over the subject matter under § 1337 of the Judicial Code, 62 Stat. 931 (1948), 28 U.S.C. § 1337 (1952), since no specific provisions of the Railway Labor Act were involved. Following Toledo, Peoria & Western Ry. v. Brotherhood of Railroad Trainmen, 132 F.2d 265 (7th Cir. 1942), *rev'd on other grounds*, 321 U.S. 50 (1944), the court held (Judge, now Justice, Stewart dissenting) that its jurisdiction was based on the threatened interference with the common carrier's federal right and duty to provide facilities for interstate commerce. 246 F.2d at 122.

And in *Chicago & North Western Ry. Co. v. Order of Railroad Telegraphers*,[69] the Court of Appeals for the Seventh Circuit enjoined a strike over a carrier's "central agency plan," which resulted in the laying off of employees, on the ground that the union could not force the carrier to agree not to abolish positions without its consent. Like the *"Toledo Yard"* case discussed above, the *Chicago & North Western* case involves essentially a featherbedding situation ("many station agents were receiving a full day's pay for twelve to thirty minutes' work"). While proposals concerning stabilization of employment such as severance pay, supplemental unemployment compensation benefits, and guaranteed employment might be legitimate objectives of collective bargaining, the court distinguished them from the situation before it as not vesting "indefinite retroactive veto power over abolition of positions [but] are expressly limited to prospective periods of short duration." The court went on to say:[70]

> It appears clear that the effect of the Union's proposal, if accepted, would place in its hands the power to prevent any undertaking by North Western to meet competition by modernizing its operations in the light of technological development, and fulfilling its obligation of operating efficiently and economically for the benefit of itself, its employees, and the public. Ultimately the Union could even bring about a situation where the railroad itself might be forced out of business or so crippled financially that all employees, including the Union's members, would suffer. This contract proposal, if accepted, would enable the Union to control the pace of North Western's compliance with the Commission orders aforesaid.
>
> . . . .
>
> The proposed contract change in the case before us represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations. It is perhaps significant that on oral argument, counsel for the Union expressed the opinion that a demand for veto over discontinuing trains, while less reasonable than that proposed here, would constitute a bargainable issue under the Railway Labor Act.
>
> . . . .
>
> [t]he fact that other carriers may have submitted to unlawful demands does not change the character of such demands. A carrier may not escape its obligations in bargaining them away.

The court in the *Chicago & North Western* case relied in part upon the distinction made by the Supreme Court in *NLRB v. Borg-Warner*[71] between subjects of mandatory and permissive bargaining. Although the *Borg-Warner* case was decided under the National Labor Relations Act, both acts impose the duty to bargain upon the parties.[72]

[69] 264 F.2d 254 (7th Cir.), *cert. granted*, 361 U.S. 809 (1959).

[70] *Id.* at 258-59.

[71] 356 U.S. 342 (1958). There the Court held that the employer's insistence that provisions for a strike ballot and for recognition of the local rather than the international be written in the agreement amounted to a refusal to bargain, since those matters were outside the scope of mandatory bargaining.

[72] Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937), is the leading case holding that there is an enforceable duty to bargain under the Railway Labor Act. §§ 9(a)(5) and 8(b)(3) of the National Labor Relations Act make it an unfair labor practice for employers or unions to refuse to

Other union demands which might fall within the "other" dispute category are those concerning "the type of product to be produced, the location of plants, the installation of new machinery and equipment,"[73] and those which discriminate against groups of employees.[74] Demands relating to supervisory personnel (other than the "subordinate officials" specified in section one, Fifth) also may not require bargaining.[75]

It is not clear whether a union can insist on demands giving rise to jurisdictional disputes affecting the jobs of other groups of employees. *General Committee of Adjustments v. Missouri-Kansas-Texas R.R.*[76] suggests that the federal courts have no jurisdiction over such matters because they are solely within the province of the NMB.[77] In that case, however, the NMB had mediated the challenged agreement, and the result might have been different if it had not participated.[78] Otherwise, the holding seems inconsistent in principle with the cases cited above[79] and *Virginian Ry. Co. v. System Federation No. 40.*[80]

bargain. 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1952). Section 8(d) defines the scope of the duty to bargain as including "wages, hours, and other terms and conditions of employment." 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1952). Since the duty under the Railway Labor Act relates to "rates of pay, rules and working conditions," § 2, First, 44 Stat. 577 (1926), 45 U.S.C. § 151 (1952), it has been suggested that the bargaining duty under that Act has a narrower scope than the duty under the National Labor Relations Act. See Inland Steel Co. v. NLRB, 170 F.2d 247, 254 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). On the general subject, see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

[73] Norfolk & Portsmouth Belt Line Ry. Co. v. Brotherhood of Railroad Trainmen, 248 F.2d 34, 41 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958).

[74] See Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Graham v. Brotherhood of L.F. & E., 338 U.S. 232 (1949).

[75] *Cf.* NLRB v. Retail Clerks, 211 F.2d 759 (9th Cir.), *cert. denied*, 348 U.S. 839 (1954); Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); Safeway Stores, Inc. v. Retail Clerks, 41 Cal. 2d 567, 261 P.2d 721 (1953); Kerkemeyer v. Midkiff, 299 S.W.2d 409 (Mo. 1957).

[76] 320 U.S. 323 (1943).

[77] Perhaps of some significance is the fact that the *M-K-T* case was decided the same day (and the opinion written by the same Justice (Douglas)) as Switchmen's Union of North America v. NMB, 320 U.S. 297 (1943), in which the Court held that no appeal may be taken from NMB certifications. The certification of a union would seem to be different from the Board's mediation of an agreement, however, which was involved in the *M-K-T* case. Curiously, Slocum v. Delaware, L. & W. Ry. Co., 339 U.S. 239 (1950), also denies relief, but on the ground that the adjustment board (rather than the NMB) has exclusive jurisdiction over jurisdictional disputes. In the *Slocum* case, however, the issue arose as a minor dispute involving a determination of the work covered in the labor agreements. As should be readily apparent from their form of organization, adjustment boards are not capable of dealing satisfactorily with disputes between a carrier and two different unions over the same matter. See Union R.R. Co. v. NRAB, 170 F. Supp. 281 (N.D. Ill. 1958), for an example of the difficult problems created when solution to jurisdictional disputes is sought through adjustment boards. Experience has by this time made it clear that as a practical matter, there is no administrative remedy under the Railway Labor Act which protects carriers (or interstate commerce) from jurisdictional disputes—as there is for other industries under the National Labor Relations Act. See also Rolfes v. Dwellingham, 198 F.2d 591 (8th Cir. 1952).

[78] *Cf.* Texlite, Inc., 119 N.L.R.B. 1792 (1958), *enforced*, 266 F.2d 349 (5th Cir. 1959).

[79] See note 75 *supra*.

[80] 300 U.S. 515 (1937). This case holds the duty to bargain with the bargaining agent designated under § 2, Ninth, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1952), to be judicially enforceable. That section "imposes the affirmative duty to treat only with the true representative, *and hence the negative duty to treat with no other.*" 300 U.S. at 548. (Emphasis added.) *Cf.* Whitehouse v. Illinois Cent. Ry. Co., 349 U.S. 366 (1955). Treating jurisdictional demands as outside the area of required bargaining would seem appropriate, especially in view of the fact that carriers have not been permitted to institute § 2,

Since the Railway Labor Act contains no procedures for the settlement of "other" disputes, the courts are primarily responsible for resolving the legal problems which may arise. The next section deals with the role of the courts under other provisions of the Railway Labor Act.

G. The Role of the Courts

The most obvious role of the courts concerns those matters for which jurisdiction is specifically conferred by the Railway Labor Act: penalties for noncompliance with provisions giving employees the right to organize without interference and prohibiting carriers from unilaterally changing rates of pay, rules, or working conditions except as provided in the Act;[81] enforcement of adjustment board awards;[82] and supervision of arbitration proceedings.[83]

Unlike the National Labor Relations Act, the Railway Labor Act authorizes no administrative body to undertake enforcement proceedings; the parties must commence their own actions to enforce rights under adjustment board awards or NMB certifications.[84] Private lawsuits in the federal courts, therefore, have assumed an important role in enforcing rights and duties under the Act,[85] and it has been established that equitable relief is available in the federal courts in such cases, despite the anti-injunction provisions of the Norris-LaGuardia Act.[86]

Ninth proceedings. If bargaining is not required on such demands, the union would then have to go to the NMB for a § 2, Ninth determination. It seems obviously in the public interest to have such matters settled by administrative determination rather than by resort to economic warfare, and this is consistent with the Railway Labor Act's objective of minimizing interruptions to commerce. § 2, First, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1952). Although the conflict between the pilots and the flight engineers has been the most acute jurisdictional dispute during the past two years, jurisdictional disputes are a continuing general problem for the airlines.

[81] § 2, Tenth, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1952).

[82] § 3, First (p), 44 Stat. 578 (1926), 45 U.S.C. § 153 (1952). If the adjustment board has not made an enforceable order, however, there can be no judicial enforcement. See Bates v. Northwest Airlines, Inc., 171 F. Supp. 273 (D.C. Minn. 1959). This section of the Act gives United States district courts jurisdiction in suits by employees to enforce adjustment board awards. (Carriers are not given a corollary right of enforcement.) In such actions, the findings and order of the adjustment board are "prima facie evidence of the facts therein stated." § 3, First (m), however, makes such a determination "final and binding" upon the parties, "except insofar as [it] shall contain a money award." The Supreme Court has held that these provisions make an adjustment board award "final and binding" if a money claim of an employee is denied, but subject to judicial review if such a claim is granted. In Union Pacific Ry. Co. v. Price, 37 CCH Lab. Cas. 65,559 (1959), Mr. Justice Brennan, speaking for the Court, observed: "The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought to be removed."

§ 201, 49 Stat. 1189 (1936), 45 U.S.C. § 181 (1952), makes § 3 inapplicable to air carriers, but § 204, 49 Stat. 1189 (1936), 45 U.S.C. § 184 (1952), requires such carriers to establish adjustment boards having jurisdiction "not exceeding" the jurisdiction of the railroad boards.

[83] §§ 7, 8, 9, 44 Stat. 582-85 (1926), 45 U.S.C. §§ 157, 158 (1952).

[84] See, *e.g.*, Switchmen's Union of North America v. NMB, 320 U.S. 297 (1943).

[85] The United States district courts have general jurisdiction under §§ 1331 and 1337 of the Judicial Code, 62 Stat. 930 (1948), 28 U.S.C. §§ 1331, 1337 (1952). Jurisdiction apparently also lies in the state courts in some matters. *Cf.* Manion v. Kansas City Terminal Ry. Co., 353 U.S. 927 (1957); National Airlines, Inc., v. Metcalf, 38 CCH Lab. Cas. ¶ 65,737 (Fla. D.C. App. 1959).

[86] See Virginian Ry. Co. v. System Federal No. 40, 300 U.S. 515 (1937); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Brotherhood of Railroad Trainmen v. Chicago River & Indiana Ry. Co., 353 U.S. 30 (1957).

Equitable relief has been granted to prevent interference or coercion in the selection of bargaining representatives;[87] to enforce the duty to bargain with certified representatives;[88] to prevent discrimination in the representation of employees;[89] to prevent strikes over minor disputes;[90] and to prevent strikes during the completion of the major dispute procedures.[91] Declaratory relief might also be available,[92] as well as damages.[93] Prior resort to the appropriate administrative agency is a neces-

[87] Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548 (1930).

[88] Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937).

[89] See the discussion in the next paragraph.

[90] Brotherhood of Railroad Trainmen v. Chicago River & Indiana Ry. Co., 353 U.S. 30 (1957). As indicated above, the adjustment board is the agency established under the Railway Labor Act for the settlement of minor disputes. It has been held, therefore, that an injunction to restrain a strike over a dispute coming within the jurisdiction of an adjustment board should not be conditioned upon restoration by the carrier of the status quo ante if the dispute concerns the carrier's right to take unilateral action. Otherwise, the court, rather than the adjustment board, would be, in effect, passing on the merits of the dispute. See Missouri-Kansas-Texas Ry. Co. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5th Cir. 1959), *cert. granted*, 361 U.S. 810 (1959); Baltimore & Ohio Ry. Co. v. Transport Workers' Union, 38 CCH Lab. Cas. ¶ 65,819 (2d Cir. 1959); Pennsylvania R.R. Co. v. Transport Workers' Union, 38 CCH Lab. Cas. ¶ 65,850 (E.D. Pa. 1959).

[91] American Airlines, Inc. v. Air Line Pilots Association, 169 F. Supp. 777, (S.D.N.Y. 1958); Trans World Airlines, Inc. v. Air Line Pilots Association (W.D. Mo. 1959); Railway Express Agency, Inc. v. Teamsters (S.D.N.Y. 1957). *Cf.* Butte, Anaconda & P. Ry. Co. v. Brotherhood of L.F. & E., 268 F.2d 54 (9th Cir. 1959). In Norfolk & Portsmouth Belt Line Ry. Co. v. Brotherhood of Railroad Trainmen, 248 F.2d 34, 46 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958), the union alternatively took the position that a major dispute was involved. Although minor disputes may be processed through to a "final and binding" award, major disputes must ultimately be settled by agreement of the parties (or by voluntary arbitration). Injunctive relief in major disputes, therefore, goes only to preserving the status quo during completion of statutory procedures and cooling-off periods, so that the parties may thereby be induced to agree without resorting to economic "self-help." See Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U.S. 711, 725 (1945). In Chicago & North Western Ry. Co. v. Order of Railroad Telegraphers, 36 CCH Lab. Cas. ¶ 65,103 (N.D. Ill. 1958), *rev'd on other grounds*, 264 F.2d 254 (7th Cir.), *cert. granted*, 361 U.S. 809 (1959), the question arose as to whether the court could preserve the status quo by restraining a strike in a major dispute only for the cooling-off period following the NMB's proffer of arbitration, or whether a new status quo period was started later when the Board had intervened in an emergency effort to avert a strike. The court held that the emergency mediation gave rise to a new status quo period.

[92] See Akron, Canton & Youngstown Ry. Co. v. Barnes, 215 F.2d 423 (7th Cir.), *judgment vacated and remanded on representation of mootness by respondent's counsel*, 348 U.S. 893 (1954); Felter v. Southern Pacific Co., 358 U.S. 812 (1959). Declaratory relief has been denied on the ground that an administrative agency has exclusive jurisdiction over the question involved. See General Committee of Adjustment v. Missouri-Kansas-Texas R.R., 320 U.S. 323 (1943); Slocum v. Delaware, L. & W. Ry. Co., 339 U.S. 239 (1950). Declaratory relief apparently also would not be available where there is a possibility that the problem will be solved by an administrative determination or by an enforcement proceeding. See Washington Terminal Co. v. Boswell, 124 F.2d 235 (D.C. Cir. 1941), *aff'd by an equally divided court*, 319 U.S. 732 (1943). *Cf.* Whitehouse v. Illinois Cent. Ry. Co., 349 U.S. 366 (1955). The courts perhaps have been too sparing in the granting of declaratory relief in such cases. As Judge Dimock said in Prudential Ins. Co. v. Insurance Agents Int. Union, 169 F. Supp. 534, 536 (S.D.N.Y. 1959):

> "It seems to me that courts in exercising their discretion in declaratory judgment cases ought to be particularly liberal where labor relations are involved. The most serious defect in the current trial-by-battle method of resolving disagreements between labor and management is that the method has no natural tendency to attain a reasonable result. The courts should welcome the opportunity to act in every case where, under the law, they can substitute a decision based on reason for one based upon the relative might of the contenders."

[93] See Louisville & Nashville Ry. Co. v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) (under state law).

sary preliminary to obtaining judicial relief.[94] Venue lies wherever the labor organization or carrier sued has a place of business.[95]

The courts have asserted jurisdiction to prevent racial discrimination, even though the Railway Labor Act does not expressly confer jurisdiction or require a union not to discriminate.[96] The theory of such relief is that the duty not to discriminate is implicit in the privileges which the Act confers upon unions[97] and that the courts should assert jurisdiction because of the lack of an administrative remedy.[98] The Supreme Court has not decided whether the rule in these cases applies to other than racial discrimination,[99] and the lower courts are divided on the question.[100]

An exceedingly complex body of law has developed concerning adjustment board proceedings. The most challenging current problems have to do with (a) the extent to which union discrimination (racial or otherwise) is a basis for judicial review or reversal of adjustment board awards,[101] and (b) the availability of a state cause of

[94] In Manion v. Kansas City Terminal Ry. Co., 353 U.S. 927 (1957), injunctive relief was denied because the plaintiff had not instituted minor dispute proceedings at the time. See also American Air Export & Import Co. v. O'Neill, 221 F.2d 829 (D.C. Cir. 1954). But Felter v. Southern Pacific Co., 358 U.S. 812 (1959), indicates that prior resort to an adjustment board is not required where the question is one of legality under the Act. *Cf.* Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R.R., 321 U.S. 50 (1944) (refusal to accept proffer of arbitration).

[95] See the discussion of this question in American Airlines, Inc. v. Air Line Pilots Association, 169 F. Supp. 777, 780-83 (S.D.N.Y. 1958). In that case, the court held that the union could be sued in New York, where it had an office, even though its principal office was in Chicago. Judge Bryan thought the result justified by analogy to the general venue provisions respecting suits against corporations, 62 Stat. 935 (1948), 28 U.S.C. § 1391(c) (1952), and the similar provision for suits against unions in § 301(c) of the National Labor Relations Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1952), as well as being "in accord with the practical realities." Even if the view is taken that venue lies only where the union has its principal office, Graham v. Brotherhood of L.F. & E., 175 F.2d 802 (D.C. Cir. 1949), *rev'd on other grounds,* 338 U.S. 232 (1949), a class action apparently may be utilized to sue elsewhere. See Griffin v. Illinois Cent. Ry. Co., 88 F. Supp. 552 (N.D. Ill. 1949); Cherico v. Brotherhood of Railroad Trainmen, 167 F. Supp. 635 (S.D.N.Y. 1958).

[96] See Conley v. Gibson, 355 U.S. 41 (1957); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of L.F. & E., 323 U.S. 210 (1944); the cases in note 74 *supra. Cf.* Oliphant v. Brotherhood of L.F. & E., 262 F.2d 359 (6th Cir. 1958), *cert. denied,* 359 U.S. 935 (1959), holding that the antidiscrimination principle does not require admission to membership in the bargaining agent where there was no finding that the exclusion resulted in actual discrimination in collective bargaining.

[97] Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202-03 (1944).

[98] *Id.* at 207.

[99] There is dictum in Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953), suggesting that the principle has general applicability.

[100] Limited to racial discrimination: Colbert v. Brotherhood of Railroad Trainmen, 206 F.2d 9 (9th Cir. 1953), *cert. denied,* 346 U.S. 931 (1954); Spires v. Southern Ry. Co., 204 F.2d 453 (4th Cir. 1953); Alabaugh v. Baltimore & Ohio Ry. Co., 222 F.2d 861 (4th Cir. 1955); Brock v. Brotherhood of Sleeping Car Porters, 129 F. Supp. 849 (W.D. La. 1955). Not limited to racial discrimination: Cunningham v. Erie R.R. Co., 266 F.2d 411 (2d Cir. 1959); Mount v. Brotherhood of Locomotive Engineers, 226 F.2d 604 (6th Cir. 1955), *cert. denied,* 350 U.S. 967 (1956); Hargrove v. Brotherhood of Locomotive Engineers, 116 F. Supp. 3 (D.D.C. 1953); Brady v. Trans World Airlines, Inc., 174 F. Supp. 360 (D. Del. 1959); Cherico v. Brotherhood of Railroad Trainmen, 116 F. Supp. 635 (S.D.N.Y. 1958). See also Rose, *The Railway Labor Act and Jurisdiction of the Courts,* 8 LAB. L.J. 9 (1957); Wellington, *Union Democracy and Fair Representation,* 67 YALE L.J. 1327 (1958); Cox, *The Role of Law in Preserving Union Democracy,* 72 HARV. L. REV. 609 (1959); Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957).

[101] The doctrine was applied in Brady v. Trans World Airlines, Inc., 167 F. Supp. 469 (D. Del. 1958), as a basis for asserting jurisdiction to review the award of a system board of adjustment where the union

action for damages as an alternative remedy.[102] Without attempting to discuss in detail these and related questions, it is enough to recognize that extreme complexity exists where there should be great simplicity, and consideration of amendatory legislation would appear to be warranted. As one exasperated judge remarked recently:[103]

> Whereas the discharged employee should be guided by simple procedures geared to the sensitivities of his hardship, in reality he has been subjected to the rigors of a guessing game. The difficulty is that the decision of the Supreme Court in Moore and its holding in Koppal are, when served, barely digestible in the same system. Beyond that, it may be asked whether the law has removed itself from the arena of common sense by adopting in the upper reaches an unrealistic approach. To put the Socratic question, does the employee who has been discharged, being thus of an uneven mind—hounded by the realization of loss of job and support for his family for an indefinite period; overwhelmed by the bigness of Organization—Union, Carrier—seemingly, and even actually, banded against him; pressured by the increasing awareness he has so little time to act to seek job restoration; and induced by the thought the Adjustment Board is the quickest, and even sole, means of doing so—grasp for relief almost blindly ignorant in most cases of his legal position? In any event, if indeed, a choice must be made, is that the selective and measured act for which he is later to be judged and refused admittance in the court house door?

One other question of general interest is the extent to which the Railway Labor Act pre-empts substantive provisions of state law. Since the Railway Labor Act contains no schedule of unfair labor practices such as that contained in the National Labor Relations Act,[104] it might seem that greater latitude exists for the application of state labor policy.[105] In *Teamsters v. New York, New Haven & Hartford R.R.*,[106]

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members of the board did not support the discharged employee's contention. In Bohannon v. Reading Co., 168 F. Supp. 662 (E.D. Pa. 1958), it was assumed that Conley v. Gibson, 355 U.S. 41 (1957), establishes a federal cause of action for "hostile discrimination" by a union in the processing of grievances. Two other cases hold that adjustment board awards are inherently unfair and subject to judicial review when the union members and representatives are antagonistic to the position of the grieving employee. See Edwards v. Capital Air Lines, 176 F.2d 755 (D.C. Cir.), *cert. denied*, 338 U.S. 885 (1949); Rychlik v. Pennsylvania R.R., 229 F.2d 171 (2d Cir. 1956), *rev'd on other grounds*, 352 U.S. 480 (1957). *Contra*, Pigott v. Detroit, Toledo & Ironton Ry. Co., 221 F.2d 766 (6th Cir.), *cert. denied*, 350 U.S. 833 (1955). *Cf.* Bower v. Eastern Airlines, Inc., 214 F.2d 623 (3d Cir.), *cert. denied*, 348 U.S. 871 (1954).

[102] There may be a state cause of action for discharge as an alternative to an adjustment board proceeding. Moore v. Illinois Cent. Ry. Co., 312 U.S. 630 (1941). If state law requires the prior exhaustion of administrative remedies, however, the employee must comply with it by first seeking relief before the appropriate adjustment board. Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953). But if, in such a proceeding, reinstatement or recomputation of earnings is sought, or seniority rights are asserted, the adjustment board award is "final and binding," the board has exclusive primary jurisdiction, and there is no independent cause of action. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239 (1950); Pennsylvania R.R. Co. v. Day, 37 CCH Lab. Cas. ¶ 65,560 (U.S. Sup. Ct. 1959); Order of Railway Conductors v. Southern Ry. Co., 339 U.S. 255 (1950); Rose v. Great Northern Ry. Co., 37 CCH Lab. Cas. ¶ 65,571 (8th Cir. 1959); Majors v. Thompson, 235 F.2d 449 (5th Cir. 1956). The jurisdiction of the federal courts in discharge damage cases is based upon diversity of citizenship. Stack v. New York Cent. Ry. Co., 258 F.2d 739 (2d Cir. 1958).

[103] Brady v. Trans World Airlines, Inc., 156 F. Supp. 82, 87 (D. Del. 1957). (Footnotes omitted.)

[104] § 8(a) and (b), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a), (b) (1952).

[105] See, *e.g.*, Louisville & Nashville R.R. v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958). See generally, Note, *State Jurisdiction Over Torts Arising from Federally Cognizable Labor Disputes*, 68 YALE L. J. 308 (1958).

[106] 350 U.S. 155 (1956).

however, it was held that state law was pre-empted in the field of secondary boycotts because of the protection in that field afforded to a railroad by the National Labor Relations Act.

III

THE MUTUAL AID PACT

On October 20, 1958, six air carriers—American Airlines, Capital Airlines, Eastern Air Lines, Pan American World Airways, Trans World Airlines, and United Air Lines entered into what has been referred to as a "mutual aid pact."[107]

The agreement (which any certificated air carrier may join merely by signing and filing a copy with the CAB) obligates each party "to pay over to the party suffering [a] strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expense." The struck party agrees "to provide the public with information concerning all air services rendered by the other parties, and to direct to them as much of the traffic normally carried by the party suffering such a strike as possible, all as the best interests of the members of the public may require."[108]

Those obligations arise, however, only if a strike resulting in a shutdown of flight operations (a) is called "for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a [presidential emergency board] and applicable to [the struck] party," or (b) is called "before the employees on strike . . . have exhausted the procedures of the Railway Labor Act," or (c) "is otherwise unlawful."[109]

The agreement became effective immediately, but provided for filing with the CAB and termination if disapproved by the Board.[110] Otherwise the agreement was to terminate on October 20, 1959, unless renewed.[111]

After the agreement had been filed with the CAB, January 14, 1959 was set as the date for oral argument, and the carriers and unions were invited to participate.

[107] Agreement CAB No. 12633 (1958) [hereinafter cited as Agreement].

[108] *Id.* §§ 1, 2, 3.

[109] *Id.* § 1.

[110] § 412 of the Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C.A. § 1382 (Supp. 1959), which carries over the provisions of § 412 of the Civil Aeronautics Act of 1938, requires that agreements between carriers affecting air transportation and relating to various matters be filed with the CAB. The Board is then required to approve such agreement if it finds it not to be adverse to the public interest or in violation of the Act. The standards to be applied by the Board in considering the public interest are set forth in § 102 of the Act. 72 Stat. 740, 49 U.S.C.A. § 1302 (Supp. 1959). Such approval exempts the agreement from the antitrust laws. § 414, 72 Stat. 770, 49 U.S.C.A. § 1384 (Supp. 1959). The Act makes the holding of a certificate of public convenience and necessity by an airline subject to compliance with the Railway Labor Act. § 401(1), 72 Stat. 754, 49 U.S.C.A. § 1371 (Supp. 1959). The most nearly similar proceeding was in 1947, when the Board approved an air carriers' agreement to establish an agency to conduct labor negotiations. See Airline Negotiating Conference, 8 C.A.B. 354 (1947). The conference subsequently was abandoned by the airlines. It has been held that consideration of general labor management policies is outside the scope of the Board's authority in administering the mail pay program under § 406 of the Act. See American Overseas Airlines v. CAB, 254 F.2d 744 (D.C. Cir. 1958).

[111] Agreement § 4. It was extended until Oct. 20, 1960 by an amendment of Oct. 13, 1959.

The Board indicated particular interest in the following five questions:[112]

1. Does the agreement violate any applicable provisions of the Railway Labor Act?

2. Will the operation of the agreement improve or impair labor-management relations in the industry?

3. Will the agreement discriminate in restraint of trade against other air carriers not parties to it?

4. What effect, if any, will the agreement have upon administration of the mail-pay program?

5. What effect, if any, will the agreement have upon the extent of Government participation in labor-management disputes?

The CAB also ordered the carriers to submit data concerning the operation of the agreement. Principally called for were reports of subsidiary agreements and arrangements, and the amount and calculation of strike losses and payments under the agreement.[113]

As of this writing, the carriers have reported a total of $6,051,527 paid under the agreement[114] for strikes totaling 110 days.

The unions attacked the agreement chiefly on the grounds that it is (a) a combination to agree in advance that no negotiations will take place, but that the contractors will stand on the recommendations of an emergency board,[115] and (b) an attempt to impose industry-wide bargaining.[116]

That the unions' charges were not true, the carriers argued, was indicated not only by the terms of the agreement itself, but also by the events following its signing, which included offers by carriers in excess of emergency board recommendations. They also contended:

(a) That the agreement is fully consistent with and promotes the statutory policies of the Railway Labor Act, because the obligations thereunder arise only if the statutory procedures are violated,[117] or after they have been completed and the union demands are inconsistent with the recommendations of a presidential emergency board. Congress intended that such recommendations, although not binding, should be persuasive as a basis for settlement rather than "flouted and disregarded."[118]

[112] Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Order No. E-13233, CAB, Dec. 4, 1958.

[113] *Id.*, Order No. E-13308, Dec. 22, 1958.

[114] Aviation Daily, May 22, 1959, p. 143. An arbitration award has been filed in Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Order No. E-14897, CAB, Feb. 3, 1960, holding American entitled to payment under the Pact in connection with the pilots' strike, because it was called before the procedures of the Railway Labor Act had been exhausted. American has received $3,372,205 pursuant to the award. Aviation Daily, Feb. 19, 1960, p. 308.

[115] Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Brief of the International Association of Machinists and Brotherhood of Railway Clerks, CAB, 1959.

[116] *Id.* at 6.

[117] *Id.*, Joint Brief of the Airline Parties, CAB, 1959, p. 16.

[118] *Id.* at 19.

(b) That interunion and intra-union cooperation are common practices, and that what is sauce for the goose is sauce for the gander.[119]

(c) That "the basic problem is one of imbalance in labor-management relations." Because of the growth of union strength, the airlines have lost the economic capacity to deal individually with unions on equal terms.[120]

(d) By virtue of the agreement, the airlines are able to use revenue which ordinarily would be their own to bolster their weak economic position during strikes. The agreement, therefore, will deter strikes.[121] "When the balance of power preponderates decisively in favor of the union, the temptation is great for the union to obtain its demands by striking rather than engaging in serious collective bargaining aimed at reconciling the interests of both parties."[122]

The airlines also contended that the agreement would not inject the CAB into the labor relations of the airline industry, that it was not inconsistent with the policies of the antitrust laws, and that it would not pose problems in the administration of the mail-pay program.[123]

In a press release dated January 26, 1959, the CAB indicated its approval of the agreement (by a four-to-one vote), and on May 20, 1959, its opinion was issued (with a dissenting opinion by Board member Minetti).[124] Approval was "subject to the following conditions":[125]

(a) The agreement should be amended by deleting clause 2 thereof, relating to routing of traffic by a struck carrier party;

(b) The approval referred to above shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) The approval granted herein shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future rate-making or other regulatory purposes under the Act.

It also required the parties to continue making reports concerning the operation of the agreement.

In reaching its decision, the Board found, on the basis of the record before it, that the agreement would not "constitute an impediment to bona fide collective bargaining,"[126] "interfere with the prompt settlement of disputes,"[127] bring "into the dispute carriers not parties thereto,"[128] or violate the Railway Labor Act.[129] Nor would it cause "such a disparity in economic power as to jeopardize the attainment of the

[119] *Id.* at 4-8 and app. B.
[120] *Id.* at 4.
[121] *Id.* TWA Supplemental Memorandum, CAB, Jan. 5, 1959, pp. 5-6.
[122] *Id.* Joint Brief of the Airline Parties, CAB, 1959.
[123] *Id.* at 27, 32, 42.
[124] *Id.* Order No. E-13899, CAB, May 20, 1959.
[125] *Id.* at 17-18.
[126] *Id.* at 5.
[127] *Ibid.*
[128] *Id.* at 6.
[129] *Id.* at 8.

statutory objectives"[130] of the Federal Aviation Act of 1958,[131] "destroy workable labor relations,"[132] or "substantially lessen competition within the air transportation industry."[133]

In so deciding, the Board did not make "any determination as to whether the agreement is a wise or beneficial step in the promotion of maximum harmony between labor and management, generally, or in air transportation in particular," since, as a statutory matter, its approval was required by "the lack of any affirmative showing that the agreement is adverse to the objectives specified by Congress."[134]

Deletion of the traffic-routing provision was required because the Board felt that the public should be advised of travel facilities on the basis of passenger convenience rather than carrier obligation and recognized that the provision "is not crucial to the purpose of the agreement."[135]

CONCLUSIONS

The Railway Labor Act's major dispute procedures have not been successful in accomplishing their primary objective—*i.e.,* the settlement of such disputes without strikes. Some students, in fact, believe that the present statutory procedures actually impede peaceful settlements. Whether that is true or not, the fact remains that labor disputes in the recent past have been accompanied by a number of serious airline strikes. The consequences of such strikes have been demonstrated, time and time again, to be gravely injurious to the public interest in the uninterrupted transportation by air of persons, property, and mail. By forcing a complete shutdown of operations, such strikes also commonly result in loss of pay by employees having different bargaining representatives and, therefore, not concerned in the dispute.

Aside from whatever fundamental changes should be made in the major dispute provisions of the Act, therefore, the public interest would seem to require at the

[130] *Id.* at 10.

[131] 72 Stat. 737, 49 U.S.C.A. §§ 1301-1542 (Supp. 1958).

[132] Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Order No. E-13899, CAB, May 20, 1959, p. 11.

[133] *Id.* at 13.

[134] *Id.* at 17.

[135] *Id.* at 12. This was accomplished by an amendment of June 5, 1959. In *id.* Order No. E-14563, CAB, Oct. 19, 1959, p. 5, the Board denied a union petition for reconsideration of its approval of the mutual aid pact, stating: "The petition contains excerpts from the legislative history of the Railway Labor Act in an attempt to show that the intent of Congress was hostile to agreements such as the one before us. The congressional history, however, only confirms our original view that, in the Railway Labor Act, Congress restricted the ambit of its proscription against compulsion to governmental action, and left the parties free to engage in reciprocal tests of economic strength within the framework of collective bargaining."

Wall Street Journal, Sept. 23, 1959, p. 2, reported the formation of a "coordinating committee for unions in the air transport industry" with a purpose of devising an answer to the mutual aid pact. A union spokesman suggested that contracts be arranged to expire at about the same time, "so we can have unified collective bargaining." The six unions involved are the Air Line Dispatchers Association, the Air Line Pilots Association, the Brotherhood of Railway Clerks, the Flight Engineers International Association, the International Association of Machinists, and the Transport Workers Union.

very least that the privilege of resorting to strike action be preceded by and conditioned on a secret strike ballot in which an absolute majority of the employees concerned reject (a) the carrier's last offer, (b) the NMB's proffer of arbitration, and (c) the recommendations of a presidential emergency board, if any. If any one of the three items listed above were not so rejected, the union involved should not be permitted to resort to economic warfare. It seems obvious that such an election should be conducted by a public agency after both sides—the union and management—have had a full opportunity to explain their positions to the employees.

Moreover, many who have had experience in the field—including this writer—have felt that strike action has been taken in some cases to accomplish objectives which are not wholly in accord with either a sound system of air transportation or the public interest. Jurisdictional and employee-qualification disputes fall into this category. Such disputes should be settled by an agency charged with protecting the public interest rather than by the pressures of collective bargaining or the balance of economic power.

A further area for correction, important from an operational point of view, is the harassment caused by threatened illegal strike action. When such threats are made, management must take them seriously and prepare for them, whether or not the unions mean them seriously. Operational uncertainty and cost result—particularly when, as is frequently the case, such threats occur over holiday travel periods and judges are not readily available to restrain them. Threats of illegal strike action certainly can be no less damaging than defamatory statements. Persons making libelous or slanderous statements have common-law liability for them, and it would not seem unreasonable to hold unions making threats of illegal strikes answerable in damages at the very least.

The minor-dispute procedures of the Railway Labor Act have been fairly successful in adjusting such disputes without resort to strike action, and the recent *Chicago River* case[136] should further strengthen those procedures. They are subject to abuse, however, and, where there is a will, there is a way to use them as an instrument of harassment. Moreover, they are unsuitable for disposing of jurisdictional disputes and troublesome problems where an individual grievance is asserted and the union itself is antagonistic to the claim.

The role of the NMB is ambiguous. The Board has correctly recognized that its primary role is mediatory, and it is probably right that the performance of certain other functions—which, nevertheless, badly need to be performed—would interfere with its effectiveness in mediation. Functions which perhaps might be performed by a separate agency include settlement of jurisdictional disputes, bargaining-unit determinations, and the conduct of representation elections.

The Railway Labor Act has been in operation for a sufficient period of time to warrant legislative review in the light of experience under it. The clamor accom-

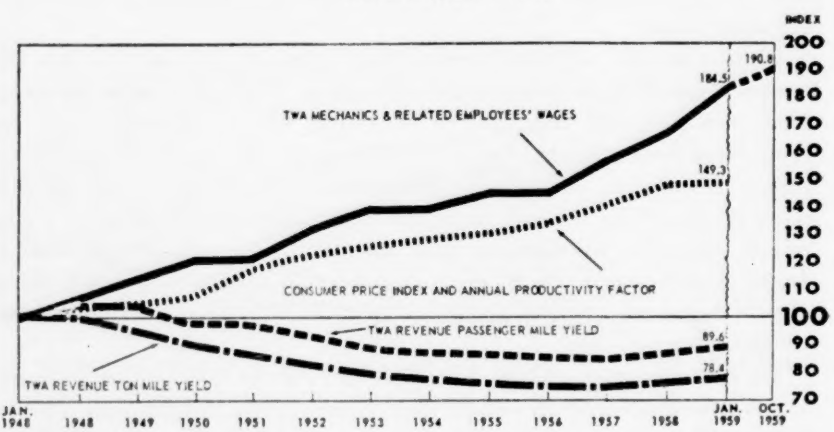
[136] See *supra* note 90.

panying recent airlines strikes is eloquent testimony to the public interest in such review and the correction of statutory deficiencies.[187]

APPENDIX A

The following chart was introduced in evidence as TWA Exhibit No. 53 by Mr. John P. Mead, Assistant Vice President of Personnel and Industrial Relations for Trans World Airlines, Inc., in the proceedings before Presidential Emergency Board No. 122. See 25 TRANSCRIPT OF PROCEEDINGS 2733 (1958). That Board investigated the disputes between the International Association of Machinists and six air carriers. The chart has been modified to reflect the 1959 settlements.

COMPARISON OF TWA—IAM MECHANICS AND RELATED EMPLOYEES' WEIGHTED AVERAGE STRAIGHT TIME PAY (EXCLUDING SHIFT PREMIUMS) WITH THE (1) CONSUMER PRICE INDEX AND ANNUAL PRODUCTIVITY FACTOR, (2) TWA REVENUE PASSENGER MILE YIELD, AND (3) TWA REVENUE TON MILE YIELD, 1948-1959
(JANUARY 1948 = 100)



1. The Mechanics and Related Employees' wages for the various years are shown as of January 1 (except 1948 which refers to wages after the April settlement).
2. The Consumer Price Index is as of January 15, 1948 and January 15, 1959; annual averages are used for the years 1948 through 1958.
3. The annual productivity factor used is 2.2. This is based on the BLS computation for 1909-1956.
4. The revenue yields are for January, 1948 and for the years 1948-1958. The increase indicated in March, 1958 is attributable to the temporary passenger fare increase of 4% plus $1.00 for each ticket granted by CAB in February. See Interim Fare Increase Case, No. 9288, Order No. E-12203, CAB, Feb. 25, 1958.

[187] Legislative review of the Railway Labor Act has been recommended from the standpoint of the railroad industry. See Railroad Passenger Deficit, No. 31954, ICC, May 18, 1959, pp. 52, 103. On the general subject of remedial legislation, see, MacIntyre, *The Railway Labor Act—A Misfit for the Airlines*, 19 J. AIR L. & COM. 274 (1952). It is suggested therein that the airlines be brought under the National Labor Relations Act, as amended.

LABOR PROBLEMS IN THE AIRLINE INDUSTRY

William V. Henzey*

Introduction

Federal supervision of the scheduled airline industry is so close and detailed,[1] that much of management's time is consumed in satisfying governmental rules, regulations, and directives. There is, however, one virtual no-man's land—the field of industrial relations—that is quite outside the scope of federal aviation regulation, as such.

Paradoxically, labor costs are the most expensive factor in producing air transport. Even the vast commitment of the industry for jet aircraft, estimated at $2,800,000,000 for the five-year period 1958-62,[2] falls short of what the airlines will pay their employees during the same period. Indeed, if the 1958 payroll of $800,000,000[3] were to remain constant—a rather fatuous assumption—the total labor outlay for the five-year period would be at least $1,000,000,000 more than that for jet aircraft. Moreover, not only is the absence of federal authority in the field of labor relations inconsistent with the Government's over-all regulation of every other phase of the airline industry, but, as will become apparent later in this article, the few federal efforts at intervention in this area, stemming from the depression-ridden days of the 1930's,[4] may have served merely to aggravate the problem.

Of course, the airlines, long burdened with cumbersome government regulation of their other economic problems, do not view with relish the prospect of extension of federal regulation to the labor-relations field.[5] Nevertheless, the program of self-

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[1] Controlling legislation is provided by the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C.A. §§ 1301-542 (Supp. 1958).

[2] "The airlines are engaged in major investment program for new jet aircraft and related facilities. Total planned capital expenditures in conjunction with this program are estimated at $2,800,000,000 over the next five years." Cherington, *The Status and Economic Significance of the Airline Equipment Investment Program*, H.R. Rep. No. 430, 85th Cong., 2d Sess. 9 (1958).

[3] "The industry's $800,000,000 annual payroll amounts to almost half (46.1%) of the total expense of running the airlines." *Balance at the Bargaining Table*, an address by Stuart G. Tipton, President, Air Transport Ass'n of America, Boston, Mass., Sept. 24, 1958.

[4] For some of the history of the unsuccessful labor attempts to get legislation enacted during this period, see, *e.g.*, testimony of representatives of the Air Line Pilots Association, in *Hearings Before a Subcommittee of the Senate Committee on Interstate Commerce on S. 2496, A Bill to Amend the Railway Labor Act*, 74th Cong., 1st Sess. 5 (1935); see also, Air Line Pilots Ass'n, The ALPA Story (rev. ed. 1957).

[5] "We do not advocate the Government step in and require its approval before a trade union can alter its strike benefits. Certainly, Government is in this thing too far as it is. But where Government plays as big a part as it does in the regulation of the airlines, we urge its intelligent appraisal of the lop-sided bargaining strength which now exists in favor of labor. The Government must not impede airline efforts to provide for the development of balanced collective bargaining." Remarks of Stuart G.

help or "mutual aid" recently installed by several major airlines[6] may indirectly conduce just this result. Certainly, if, owing to "mutual aid" and other measures taken by the carriers, the bargaining advantage shifts more markedly toward management, then employee groups conceivably may urge that the governmental bodies that have successfully enforced close regulation of other phases of airline operation also undertake regulation of airline labor relations. The dilemma for the airlines is thus quite serious, since the alternatives to self-help seem quite unattractive and unpromising.[7] Consequently, although management does not desire expansion of federal control over its activities, it seemingly must risk this to escape even less palatable possibilities.

By way of further background, it should be recalled that the Civil Aeronautics Board, originally created under the Civil Aeronautics Act of 1938,[8] still retains the supervision of the airlines' general economic problems under the Federal Aviation Act of 1958.[9] Various technical and operational phases of airline operation, too, are similarly regulated by the Federal Aviation Agency, newly created by the 1958 Act. However, the field of collective bargaining between airlines and labor unions falls within the purview of neither agency; it rather comes under the Railway Labor Act of 1926, which Congress extended in 1936 to the then-infant airline industry.[10] Significantly, the economic regulation of the industry for other than labor matters began in 1938—*after* the airlines had been subjected to the Railway Labor Act.

During the hectic 1930's, airline officials were so concerned with the problem of survival in its rawest sense that little mature consideration was given the few labor problems that did arise.[11] In such an atmosphere, the one airline union of that period, the Air Line Pilots Association, had little difficulty in obtaining a government floor for its members' salaries[12] and, with the help of the railway brotherhoods, in

Tipton, President, Air Transport Ass'n of America before Aviation Writers Association, National Press Club, Washington, D. C., Dec. 9, 1958.

[6] Six major certificated United States air carriers proposed a program of self-help in an agreement filed with the Civil Aeronautics Board on Nov. 3, 1958. The agreement, often referred to as a "mutual aid" pact, calls for minimum financial aid to the member carrier shut down by a strike called under certain conditions—*e.g.*, failure by a union to honor recommendations of a presidential emergency board. The CAB approved the agreement, Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Order No. E-13899, CAB, May 20, 1959; and affirmed the ruling by denying petitions for reconsideration on Oct. 29, 1959.

[7] The most talked-about major change in the management-labor field in the airline industry has been legislation to enforce compulsory arbitration. The airline industry is far from unanimous in the belief that compulsory arbitration is a solution to its problems. Inherently, labor unions resist such a move, which, defined bluntly, removes their right to strike.

[8] 52 Stat. 973, 49 U.S.C. §§ 401-681 (1952).

[9] 72 Stat. 737, 49 U.S.C.A. §§ 1301-542 (Supp. 1958).

[10] 44 Stat. 577, as amended, 49 Stat. 1189, 45 U.S.C. §§ 151-63, 181-84 (1952).

[11] During consideration of amending the Railway Labor Act to embrace the airline industry, airlines appeared to pay little attention to the hearings in Congress. At one point in the hearings, the chairman asked: "Is there somebody here that is interested in the other side of this question?" No one answered. *Hearings Before the Subcommittee of the Senate Committee on Interstate Commerce on S. 2496, A Bill to Amend the Railway Labor Act*, 74th Cong., 1st Sess. 23 (1935).

[12] Certain wage formulae for determination of airline pilots' pay were established in In the Matter of the Air Line Pilots' Wage Dispute 2 Nat'l Lab. Bd. Dec. No. 83, at 20 (1934). This decision was incorporated in the then-existing legislation governing commercial airlines, the Air Mail Act of 1934, 48 Stat. 933; subsequently, when federal authority over aviation was vested in the Civil Aeronautics Authority

persuading Congress to extend the Railway Labor Act to aviation. The attitude exhibited by airline management during the 1930's, when the ALPA was securing these gains, has, however, changed. Indeed, the fall and winter of 1958 marked a turning point in commercial aviation, since the industry, as well as government and a large segment of the public, then recognized openly and frankly that industrial relations is a major phase of the air transportation business and must be dealt with as such. Labor, of course, had become aware of that fact over twenty years before—and had since then acted rather decisively on that basis.

I

1958, AIRLINE LABOR PROBLEMS REACH THE CREST

Whenever the airline industry has undertaken a re-equipment program—that is, whenever a new type of plane reflecting substantial technological advances has been placed in scheduled service—a period of labor unrest has ensued. For example, the early legislative activities of the ALPA in the mid-1930's accompanied the airline industry's switch to the now-famous Douglas DC-3 twin-engined transport. Then, at the close of World War II, when the airlines moved into the four-engined-aircraft era with the Lockheed Constellation and the Douglas DC-6, the ALPA and other unions sought to share, through increased wages and improved working conditions, in what they termed the "increased productivity" of the new large airplanes. Again, in the 1953-54 period, when the last word in piston-engined planes—*i.e.*, the Douglas DC-7—was introduced, a period of labor unrest ensued.

Early in 1958, it became clear that the vigor with which labor's position had previously been asserted would be magnified almost in proportion to the scope of the revolution in technology represented in the step-up of the airlines from piston to jet-powered aircraft.[13] By the end of that year, the toll on operations taken by labor unrest was by far the heaviest that the airline industry had ever sustained.[14]

(or Board) under the Civil Aeronautics Act, it was incorporated as a floor for pilot pay scales that must be observed by certificated airlines; and it has since been carried over into the Federal Aviation Act of 1958, 72 Stat. 754, 49 U.S.C.A. § 1371(k) (Supp. 1958). Although the floor on pilots' salaries ordered by Decision 83 is far below current pay scales, basic features of the decision remain in effect, such as the 85-hour monthly limit on flying and the factors which go into determination of salaries, such as hourly pay, mileage pay, etc.

[13] The first pure jet aircraft ordered by the United States scheduled airlines were due for delivery and service in late 1958. Jet-age contract disputes were evident in late 1957 and highlighted in early 1958, when the pilots union shut down a major airline for over three months.

[14] The following strikes occurred in the airline industry in 1958:

Carrier	*Date of Walkout*	*Duration*	*Union*
Eastern	1-31-58	½ day	Machinists (IAM)
Western	2-21-58	108 days	Pilots (ALPA)
Central	4- 7-58	10 days	Machinists (IAM)
Eastern	5-12-58	33 hrs.	Machinists (IAM)
Pan American	7-15-58	4 days	(TWU)
American	9-19-58	23 hrs.	(TWU)
Northeast	9- 3-58	1 day	Machinists (IAM)
Pan American	9-19-58	1 day	B.R.C.
Capital	10-15-58	37 days	Machinists (IAM)

A total of fifteen strikes had occurred, ranging in duration from one-half day to 108 days. "Although the national rate of idleness due to strikes was only 2/10ths of one per cent," said the Air Transport Association in a January 13, 1959 press statement, "the man-days lost in the airline industry was 20½ times greater than the national average."

Issues dominating these labor disputes were: (a) higher wages for flying or maintaining new jet-powered aircraft, and (b) what should be the qualifications of the "third crew member" on jet aircraft—a jurisdictional dispute between pilots and flight engineers.[15] Intertwined with these issues was an explicit labor fear that the speed and capacity of the jets are so great in comparison to even the largest modern piston-engine planes that fewer aircraft, hence fewer employees, would be required by the airlines. This fear, in turn, produced charges—almost an echo of those heard in recent railroad labor disputes—that the unions were using, or seeking to use, "featherbedding" to offset technological progress.[16]

The "third man" dispute between pilots and flight engineers is perhaps the best example of the airline industry's jet-age labor problem, and it can be profitably examined in some detail.

Existing federal regulations[17] require that an individual possessing an engineer's license or certificate serve on commercial airliners with a maximum certificated gross weight of 80,000 pounds or more.[18] Since all commercial air transports in this country must have a pilot and a copilot, these regulations really demand that there be a third man in the complement of flight crew members. The ALPA, collective bargaining representative for commercial airline pilots and copilots, insists that the third crew member on new turbo-prop or jet aircraft must, in addition to present

Lake Central	11-23-58	13 days	Stewardesses (ALSSA)
West Coast	11-21-58	3 days	Machinists (IAM)
TWA	11-21-58	16 days	Machinists (IAM)
Eastern*	11-24-58	38 days	Machinists (IAM); Flight Engineers (FEIA)
American	12-20-58	21 days	Pilots (ALPA)

* Eastern shutdown involved two simultaneous strikes, the machinists and flight engineers walking out on identical dates.

SOURCE: Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Brief on Behalf of American Airlines *et al.*, CAB, Jan. 5, 1959, app. D, table 3.

[15] The so-called "third man" dispute in the airline industry is sometimes likened to the railroads' dispute over a fireman in a Diesel-powered engine. Railroads contend that since there are no fires to be tended in such an engine, labor contracts calling for continued use of a fireman on Diesels is "featherbedding." See, *e.g.*, address of Daniel P. Loomis, President, Association of American Railroads, Annual Meeting of the National Association of Shippers Advisory Boards, St. Louis, Mo., Feb. 11, 1959. Actually, the airline dispute is not identical in nature to the railroads' problem, although both appear susceptible to "featherbedding" criticisms. In the airline industry, there was no doubt that a third crew member would be used on jets; thus, there was no issue of dropping an employee position for reasons of advanced technology. In cases where the issue appears to have been "settled," the airlines have agreed to maintain the flight engineer and add another pilot, making a cockpit crew of four.

[16] "Featherbedding, which hangs like an economic albatross around the neck of the nation's railroads draining them of $500 million yearly, must be wiped out." Loomis, *supra* note 15.

[17] Civil Air Regulations, 14 C.F.R. §§ 35.6, 40.263, 41.73 (1957), issued by the CAB, Oct. 5, 1948.

[18] All jet aircraft ordered by United States scheduled airlines exceed 80,000 lbs. in gross weight. Excluded from the rule requiring a third crew member are all twin-engined aircraft.

requirements, be qualified as a pilot.[19] Four certificated air carriers (Braniff, Capital, Delta, and Panagra) currently employ the pilot-qualified third crew member; and two other carriers (Continental and United) are in the process of converting from mechanic-qualified engineers to pilot-qualified engineers. The remaining airlines with aircraft of a size sufficient to require a third crew member under the regulations utilize mechanic-qualified engineers.

The Flight Engineers International Association serves as the collective bargaining agent for the mechanic-qualified engineers, except those employed by Northwest Airlines, who are represented by the International Association of Machinists. The FEIA's view has been that the third crew member on the new jet aircraft must possess "a thorough mechanical training and background [which] cannot be provided by a pilot-flight engineer. . . ."[20] Furthermore, the FEIA maintains that airframe-and-engine (A & E) licenses should be required of the third crew member in addition to the flight engineer's certificate currently required by government regulations.

The AFL-CIO has, in appropriate charters, recognized both unions, the ALPA and the FEIA, as representing their respective crafts. Which union represents the "third man" on individual airlines, however, is subject to certification by the National Mediation Board, this, in turn, to be dictated by the wishes of a majority of the employees involved for the particular airline.[21] Thus, on those airlines where mechanic-qualified engineers occupy the third seat, the Board has certified the FEIA as the appropriate bargaining agent; and where pilot-qualified engineers are used, the ALPA has usually been certified.[22]

During the 1958 disputes, the question, therefore, was whether all airlines, in the operation of jet aircraft, should employ as the third crew member one qualified for pilot duties and represented by the ALPA, or whether those airlines currently employing mechanic-qualified engineers represented by the FEIA might continue to do so. A total victory for the ALPA would have resulted in the use of its pilot members in the third seat of all commercial jet aircraft. For the FEIA, a total victory would have consisted in the continued use of its mechanic-engineer members as third men for commercial jet aircraft operated by those companies with which this union had collective bargaining agreements before the dispute arose.

Obviously, those airlines that had contracts with the ALPA for pilots and copilots

[19] "Be it further resolved that the Board of Directors at the 14th Convention adopt as mandatory ALPA policy, that no Turbo-prop or Jet Turbine powered aircraft will be operated unless and until it is manned at all the flight stations by a qualified pilot in the employ of the company as a pilot, and BE IT FURTHER RESOLVED that crew members shall be known as Captain, First Officer, Second Officer, Third Officer, Fourth Officer, etc., and under no circumstances will such pilots be referred to as Flight Engineer, Navigator, Radio Operator, etc. . . ." The Air Line Pilot, May 1958, p. 14.

[20] EMERGENCY BOARD No. 120, REPORT 12 (1958).

[21] 44 Stat. 577 (1926), as amended, 49 Stat. 1189 (1936), 45 U.S.C. §§ 152, 182 (1952).

[22] In such cases, there need not be a specific certification of the ALPA to represent flight engineers. Instead, there may be certification of the ALPA to represent flight crew members, with the scope clause of the contract between the ALPA and the company involved embracing the duties of the third crew member or flight engineer.

and with the FEIA for flight engineers were caught squarely in the middle of the jurisdictional dispute. Should a company side with the ALPA position, there was a distinct threat that the FEIA would strike—at least as to jet aircraft and possibly as to all the company's airplanes. And if a company, instead, sided with the FEIA, then it faced the distinct possibility of being grounded by an ALPA strike.[23]

President Eisenhower, at the request of the NMB and after several unsuccessful attempts to settle the disputes through mediation, created presidential emergency boards to make recommendations on issues, including the "third man" dispute, involving the two unions and Eastern, Trans World, and American.[24] Emergency Board No. 120, created on January 21, 1958, dealt with the contract dispute between Eastern and the FEIA; Board No. 121, created a week later, considered the dispute between the same airline and the ALPA. The same three men sat on both boards;[25] the two disputes were generally considered simultaneously in so far as the "third man" issue was concerned; and the two boards issued simultaneous reports on July 21, 1958, in which they recommended that the disputes be settled in compromise fashion.[26]

First, the third seat on pure jet aircraft, it was suggested, should be occupied by pilot-qualified personnel, but mechanic-engineers should be afforded an opportunity to obtain pilot licenses and thereby qualify for "third man" duties;[27] secondly, the third seat on turbo-prop planes should be occupied by mechanic-qualified engineers. This represented a complete victory for the ALPA as to pure jets and a stalemate as to other types of aircraft, including, prop-jets. Moreover, despite the "compromise" label given these recommendations, it should be noted that in the Eastern dispute, the boards seemed to accept the ALPA's over-all position by adopting its views as to safety requirements, the need for "harmony in the crew," and the "decelerating need for mechanic-qualified personnel in the cockpit of new jets."

[23] "Each organization [ALPA and FEIA] has put the carrier on notice that its members will not operate the airlines, or at least not the turbine-powered equipment shortly to be received, unless its position is recognized." EMERGENCY BOARD NO. 121, REPORT 3 (1958). Subsequent events proved this observation to be correct. The FEIA struck Eastern in November 1958, and the ALPA struck American in December 1958, with the disputed crew position in issue in both disputes

[24] Such emergency boards normally consist of three men but may consist of only one man and, in fact, may consist of any number of individuals the President may decide to appoint. Statutory authority for creation of such boards rests in § 10 of the Railway Labor Act of 1926, 44 Stat. 586, as amended, 49 Stat. 1189 (1936), 45 U.S.C. §§ 160, 181 (1952). Emergency boards recommend; they do not rule or decide. Board No. 121 said: "After all, we are not a forum in the nature of a court. We make no binding decisions or rulings. We may merely report and recommend." EMERGENCY BOARD NO. 121, REPORT 5 (1958).

[25] David L. Cole, Paterson, N. J., chairman; Saul Wallen, Boston, Mass., member; and Dudley E. Whiting, Detroit, Mich., member.

[26] As to the "third man" issue, the wording of both reports was identical. Of course, portions dealing with separate wage and rules issues were different in both reports.

[27] "But, and this is exceedingly important, under the program we recommend, the jobs for flight engineers will not be restricted to piston and turboprop airplanes. For those who can and are willing to do so, we propose that sufficient pilot training be offered at the carrier's expense to qualify them for jobs on any aircraft, including the turbojets." EMERGENCY BOARD NO. 120, REPORT 23 (1958).

Emergency Board No. 123[28] was created on March 27, 1958, to recommend a solution to a contract dispute between TWA and the FEIA which was largely concerned with future contingencies. The parties were not at odds about occupancy of the third seat on new TWA jets by mechanic-qualified engineers;[29] but, the possibility that government regulations affecting third-seat occupancy might be changed, together with other future uncertainties, produced a need for a presidential emergency board that could recommend specific contract wording.[30]

The resulting report, centering as it did on contract wording to meet future contingencies, cannot properly be construed as a specific decision as to whether the third seat should be occupied by a pilot-qualified or a mechanic-qualified flight engineer. Still, there were more than a few who felt that by omission, this report tended to weaken the report in the Eastern dispute, in which pilots had been strongly favored as the third man. Emergency Boards Nos. 120 and 121 had considered safety a paramount factor in inclining toward a pilot-qualified engineer; Board No. 123 did not stress this factor.[31] Therefore, it could be argued that either the reports in the Eastern dispute had exaggerated the safety problem, or else that Board No. 123 had been lax in accepting without protect the company's decision to employ mechanic-engineers in the third seat of jet aircraft.[32] This all proceeds, however, on the questionable assumption that the emergency boards were charged with responsibilities for other than the settlement of labor disputes and that the boards had the authority to consider safety factors, instead of leaving them to airline officials and the CAB.

Emergency Board No. 124[33] was appointed June 19, 1958, to consider the dispute between American and the ALPA. Unlike Eastern, which had simultaneous disputes with the ALPA and the FEIA, and unlike TWA, which had a dispute with FEIA and no jet-age contract with ALPA, American had signed a five-year jet contract with the FEIA. Board No. 124 never ruled on the issues between the parties, but instead simply directed the carrier and the union to resume negotiations.

[28] Dudley E. Whiting, one of the three-man contingent which made up Emergency Boards Nos. 120 and 121, cases involving Eastern, was the sole member of Board No. 123 handling the TWA-FEIA dispute. This was according to a stipulation of the parties which, among other things, provided that Whiting be authorized to consult with the other two men who served on Boards Nos. 120 and 121.

[29] On April 2, 1958, TWA issued a statement of policy which read, in part: ". . . In view of all factors, it has been determined that present Company policy will be to use mechanic engineer qualified individuals to perform the flight engineering functions on TWA jet aircraft, when the federal regulations require a separate crew member to perform this function and do not require such individual to possess pilot qualifications."

[30] "The failure of the parties to reach agreement upon a scope clause thereafter, and particularly in these proceedings, is not due to any basic difference in objectives but is due to their consideration of future contingencies, no matter how remote they appear, and their desire for the utmost protection in such cases." EMERGENCY BOARD No. 123, REPORT 2 (1958).

[31] That safety, as such, was not a factor in EMERGENCY BOARD No. 123, REPORT (1958) is apparent from this statement: "These recommendations are an appropriate basis for a fair and reasonable agreement which will achieve the greatest possible job security in a changing era." *Id.* at 4.

[32] In light of the Board membership, see notes 25 and 28, *supra*, this argument is somewhat weakened.

[33] James J. Healy, Boston, Mass., chairman; Benjamin C. Roberts, New York State Board of Mediation, member; and Maynard E. Pirsig, Dean, University of Minnesota Law School, member.

There were, however, several public pronouncements by officials of both American and the ALPA in which widely-differing views were offered concerning the merits of the Board reports on the "third man" issue in the Eastern dispute.[34]

A few general observations can be offered concerning the entire emergency board procedure utilized for these airline disputes. First, it should be recalled that neither party is bound to accept the recommendations of an emergency board; instead, the only requirement is that all maintain the status quo for thirty days after the board has served its report. Moreover, although the President appoints these boards after certification of a dispute to him by the NMB, the report submitted by a presidential emergency board is not approved by the President; it merely furnishes him with the board's recommendation for a settlement.[35] Sometimes public opinion will crystallize in favor of a settlement along the lines recommended by a board, and this may occasionally be strongly persuasive. Clearly, though, an emergency board has no direct regulatory authority like that of the CAB—a fact the importance of which cannot be overemphasized.

Second, an emergency board is charged with the settlement of a particular dispute between particular parties. This *ad hoc* mission is quite different from the prescription of general rules for an industry. Yet, in so far as safety factors were urged by the pilots in support of their positions in the "third man" controversy, the attention of the emergency boards was directed to a problem of industry-wide scope, a problem that went beyond solution of a single labor contract dispute. Safety and related matters would appear to be within the purview and competency of the CAB and the Federal Aviation Agency, rather than an emergency board. However, one board has argued that since these regulatory agencies have no authority over labor disputes, to the extent that "such a dispute creates difficulties which may have an impact on safety in operations, some agency other than the CAB must take a hand in correcting the problem."[36] This contention suffers, however, in that it does not

[34] Selected comments from press release statement, July 28, 1958, by American Airlines President, C. R. Smith: "The recommendation . . . involving Eastern . . . does not, in our opinion, fit the situation of an entirely separate dispute involving comparable personnel of American Airlines. . . . American has an agreement with the FEIA which has yet nearly five years to run. I am sure that it is not the intention of the Emergency Board that the airlines will cease to respect their obligations to unions which represent their employees."

The ALPA, in a news release dated July 21, 1958, said the recommendations of the emergency boards in the Eastern case "required the most serious consideration because of the eminent qualities of the Board members and their long and detailed study of the problem." C. N. Sayen, ALPA President, was quoted in the same release as noting that the report "now becomes in effect the recommendation of the President of the United States and therefore carries great weight and must be carefully considered."

In an Aug. 1, 1958 release, Sayen, referring to American Airlines President Smith's statement above, said Mr. Smith was "whistling in the dark." In effect, Sayen accused American of advocating lesser safety standards for its jets than recommended by the emergency boards in the Eastern case.

[35] Thus, there have been incorrect references to the status of the reports of Emergency Boards Nos. 120 and 121 as reflecting the approval of the President of the United States. This grew out of an admitted press conference error, and the President's press secretary later clarified the matter for newsmen. The President did not (and does not) approve an emergency board's recommended solutions to a labor dispute.

[36] "It should also be mentioned that the CAB has no jurisdiction over labor disputes, and that to the extent that such a dispute creates difficulties which may have an impact on safety in operations,

indicate why the CAB cannot promulgate regulations to dispose of genuine safety problems. For instance, if safety is really threatened by use of third men who are not pilot-qualified—as the board in the Eastern dispute seemed to believe—should not the CAB by directive require the use of pilot-qualified flight engineers? And, in the absence of such directive, should not the emergency boards omit alleged safety matters from their inquiry?

Third, in determining what precedential weight, if any should be given to emergency board recommendations, one must always keep in mind how different one airline's situation may be from another's, and the fact that a solution suitable for one may be totally infeasible for another. For instance, at the time of its dispute, American was already bound by a five-year contract with the FEIA. Obviously, in some respects, it did not have the same freedom of choice as did Eastern, which had no long-term contract with either of the unions involved. To assume, therefore, that the "compromise" recommended in the Eastern dispute would be appropriate for American might be quite unrealistic. In short, a strong case can be made for the view that an emergency board's recommendations deserve almost no weight as precedent.[37]

Fourth, even if each case is to be decided on its own merits, those companies without the benefit of an emergency board report have sometimes been at a disadvantage. For example, Western was shut down for over three months by a pilots strike in which the "third man" issue was involved, but the NMB refused repeated requests to certify the case to President Eisenhower for creation of an emergency board. Somewhat similarly, National was shut down for forty-five days by a pilots strike in 1957, but no emergency board was created, and the eventual strike-settling contract left open the "third man" dispute. While it cannot be proved conclusively, the length of these two strikes in comparison with those in which emergency boards were created would suggest that the boards have effected a quicker settlement of airline labor disputes than would otherwise have been the case.[38]

II

The Over-All Airline Labor Picture Today

A. The Unions in the Industry

Thirty-one labor unions represented employees of the nation's certificated airlines as of March 1, 1959. Only ten of those are so-called "independent locals," the other

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some agency other than the CAB must take a hand in correcting the problem. This supports the view that a specially appointed emergency board should reasonably be expected to inquire into such matters." Emergency Board No. 120, Report 11 (1958).

[37] The emergency board must seek to solve a labor dispute rather than establish rules of general applicability. In this framework, its value as a precedent is questionable. Indeed, the member of the one-man board in the TWA-FEIA dispute did not rely on the recommendations as to the "third man" which had been expressed by the three-man Emergency Boards Nos. 120 and 121, on which he had been a member, and with whose other members he was free to consult. See notes 25, 28, and 32 *supra*.

[38] See also the table in note 14 *supra*.

twenty-one being national in scope. Included in the latter group is James R. Hoffa's Brotherhood of Teamsters, which recently won a certification vote to represent the stock clerks of Pan American.[39] Of the industry's 149,000 employees as of July 31, 1958, some 82,000, or fifty-five per cent, were organized.[40] Significantly, airline employees enjoy the highest average wages in the entire field of American transportation and far exceed the national average wage.[41]

The three largest unions, as determined by the number of airline employees represented, are the International Association of Machinists, representing 27,913 airline employees; the Transport Workers Union, 15,354; and the Air Line Pilots Association, 14,354.[42] Interestingly, the total number of personnel of the country's largest airline, American, is some 7,900 less than the total airline membership of the IAM. Since 1946, the three top unions in terms of airline employee representation rank in the same order in the number of strikes called against the industry: IAM, nineteen strikes; TWU, eleven; ALPA, eight.[43] ALPA strikes, averaging sixty-one days per strike, have been longer, however, than those of the other unions. The nineteen IAM walkouts averaged twenty-five days, and the eleven TWU strikes averaged only three days each.

B. The Procedure for Bargaining

Under the Railway Labor Act, a party to an existing collective bargaining agreement who desires a change therein must give notice to the other party at least thirty days prior to the termination date of the contract. Required by section six of the Act,[44] this notice is often termed a "section 6 notice," and it formally opens the "negotiation" stage. Within ten days after receipt of such a notice, the parties must agree on the time and place to begin the negotiating conferences; and within thirty days after receipt of the original notice, the actual negotiating conferences must begin.

When negotiations prove unsuccessful, either party may request the services of the NMB, consisting of three members appointed by the President subject to Senate

[39] On Feb. 25, 1959, the Teamsters won an overwhelming vote to represent all of the stock clerks of Pan American World Airways. Formerly, the stock clerks were represented by the IAM. In the representation election, 861 employees were eligible to vote; a total of 530 favored the Teamsters, 218 voted for the IAM, and the remaining 41 votes were scattered.

[40] Unofficial estimate made as of July 1958 by Air Transport Association of America.

[41] The average wage in the airline industry in 1956 (the latest year for which comparison is available) was $5,474. It probably exceeded $5,800 in 1958. Average wages for 1956 in other areas were:

Railroads	$5,081.	All Transportation	5,032.
Highway	5,166.	All Industry	4,021.
Water, Pipe, etc.	5,158.		

SOURCE: AVIATION FACTS AND FIGURES 102 (1958).

[42] Unofficial estimates made as of July 1958 by Air Transport Ass'n of America.

[43] Tabulation taken from Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Brief in Behalf of American Airlines *et al.*, CAB, Jan. 5, 1959, app. D, table 3.

[44] 44 Stat. 582 (1926), as amended, 49 Stat. 1189 (1936), 45 U.S.C. §§ 156, 181 (1952).

approval, which implements the Railway Labor Act. Alternatively, the Board may proffer its services voluntarily. Once the Board's services are invoked or accepted, however, the dispute has entered the "mediation" stage, and the parties must maintain the status quo at least until the Board has officially withdrawn its services. The Act requires that the Board "promptly put itself in communication with the parties . . . and shall use its best efforts, by mediation, to bring them to agreement."[45] Should mediation fail, the Board seeks to get agreement by both parties to submit the unresolved phases of their controversy to arbitration. If this proposal is rejected by either side, the Board may withdraw its services entirely or may, under certain conditions of national import, submit the controversy to the President for his appointment of an emergency board.

The Railway Labor Act, especially at its inception and occasionally since then, has been referred to as "model labor legislation."[46] But after the serious disturbances in the airline industry in 1958, there was widespread misgiving concerning the efficacy of the Act for modern commercial aviation needs.[47] In fact, top officials of the airline and of the industry's labor unions have met in an unprecedented closed-door conference with Secretary of Labor Mitchell to discuss possible legislative revision of the currently applicable labor dispute procedure.[48] Compulsory arbitration, however, apparently is not favored by any of the parties.[49]

C. Fundamental Problems

But even the most extensive changes in labor dispute and collective-bargaining procedure for the airline industry will not wipe out overnight two fundamental problems—one, the nightmare of management, and the other, of labor. From management's standpoint, the overriding problem is its lack of strength to negotiate

[45] 44 Stat. 580 (1926), as amended, 49 Stat. 1189 (1936), 45 U.S.C. §§ 155, 181 (1952).

[46] Testimony of Frances Perkins, then Secretary of Labor: ". . . the Railway Labor Act embodies the fullest and most complete development of mediation, conciliation, voluntary agreement and arbitration that is to be found in any law governing labor relations. . . ." *Hearings Before the Senate Committee on Commerce and the Senate Committee on Education and Labor, on S. 3078, Amending the Merchant Marine Act of 1936*, 75th Cong., 2d Sess. 968-69 (1938).

[47] Secretary of Labor Mitchell remarked as follows in a Jan. 4, 1959 press statement: "Whether changes in the Railway Labor Act are needed is a matter on which I have an open mind. . . . I do believe, however, that in view of the recent strike activity, a reappraisal of the Act is in order. Consequently, I intend to convene shortly a meeting of top representatives of labor and management in both the railroad and airline industries to solicit their views and advice as to whether the Railway Labor Act needs any amendment and, if so, in what respects."

[48] "Secretary Mitchell met with top representatives of labor and management in the airline industry today and solicited their advice and recommendations with regard to possible amendments to the Railway Labor Act. There was full discussion of this matter and the Secretary stated that he wished carefully to consider the advice he received before he determined upon what amendments, if any, he would recommend to the Act. There was also a full discussion of the general industrial relations problems of the industry and at the close of the meeting it was agreed that another meeting will be held shortly." Dep't of Labor Press Release, Feb. 9, 1959.

[49] "Spokesmen for airline managements and unions have joined in rejecting proposals for compulsory arbitration of airline labor disputes, it was learned today. Their views were made known to Labor Secretary Mitchell at a day long conference. . . ." United Press International, Feb. 11, 1959.

at the collective-bargaining table;[50] from the unions' standpoint, it is the effect on employment of the industry's rapid technological strides.[51]

Discussion of each of these problems often suffers from excessive reliance on a panoramic view. Management's difficulties are usually analyzed on a total industry basis, with sight more often than not being lost of the individual components of the industry. Similarly, all unionized employees are treated as "labor," even though wide disparities exist in the functions, responsibilities, compensation, and strength of the 82,000 employees involved. To compound confusion, when precedent is sought, the whole, and sometimes sordid, history of railroad labor problems is lumped into one "railroad precedent" and applied indiscriminately to the airline industry.

Just as the presence of a large number of small unions in the airline industry has created some difficulties, so does the existence of many small carriers. There are over fifty certificated airlines in the United States scheduled airline system, ranging from small territorial helicopter and local-service airlines to the large domestic and international trunk carriers. The pilots for the smallest are represented by the same union which represents the pilots for the largest airlines; and the strength of that union, the ALPA, is geared to meet the economic strength of the largest carriers.[52] When so powerful a union pits itself against any but the largest airlines, its preponderant power is overwhelming. Indeed, so precarious is the financial situation of many smaller airlines that an ALPA strike threat, as distinguished from an actual strike, is often sufficient to accomplish the union's purpose. The small line simply cannot afford a prolonged shutdown. Nor, in fact, can many of the larger carriers.[53]

[50] "The basic problem is one of imbalance in labor-management relations. Unions with which the airlines bargain have become so strong and have achieved such unity of collective action that, individually, the airlines have steadily been losing the economic capacity to deal with the unions on terms approaching equality." Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Brief in Behalf of American Airlines *et al.*, CAB, Jan. 5, 1959, p. 4. "To minimize labor conflict in the airline industry, to arrive at industrial peace with justice in the interest of the public, it is imperative that conditions in this field be modernized to permit a better balance at the bargaining table. Only in this way can true collective bargaining prevail." *Balance at the Bargaining Table*, an address by Stuart J. Tipton, President, Air Transport Ass'n of America, Boston, Mass., Sept. 24, 1958.

[51] A united labor front to meet jet-age problems was urged and ex[illegible]d this way by a top union official: "This united front should be formed to meet the Number One [illegible]d of airline workers in the dawn of the jet era—a shorter work week. Without a shorter work week, countless thousands of airline workers stand to lose their jobs. If we are not farsighted enough to seek a united front of airline unions now, upon our shoulders will rest most of the responsibility for the loss of those jobs, and the resulting havoc which awaits those workers and their families." Michael J. Quill, President, Transport Workers Union of America, Editorial, TWU Express, Jan. 1959.

[52] The ALPA is quite ready to do battle with the large carriers. Of 8 strikes by ALPA since 1946, 5 have been against the so-called "Big Four" airlines.

[53] "Thus, the situation was one in which the financial integrity of the carriers was seriously threatened and their capacity to serve the public greatly impaired by a series of major strikes. . . . The four carriers involved [Capital, TWA, Eastern, and American] sustained a combined loss of operating revenues amounting to more than seventy million dollars, and this in revenue which can never be recouped since transportation is a perishable commodity which cannot be stockpiled." Guy L. Farmer in Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Transcript of Oral Argument, CAB, Jan. 14, 1959, pp. 9-10.

A strike threat has a potency in aviation far greater than it does in industry generally. In many businesses, a strike threat produces a spurt in sales as the public stocks up on the product which may become unavailable if the strike occurs. If the strike does not occur, the employer may actually have gained additional revenue. If it does, however, the stockpiling greatly limits, or averts, any ultimate loss. Airline travel, however, cannot be stockpiled in this way. Moreover, a publicized threat to strike results in immediate uncertainty and inconvenience to the public which is quickly translated into a loss of business for the company. Actually, while staying within the letter of the Railway Labor Act, which may at a particular time make an actual strike unlawful, the union can, by indirection, exact a substantial economic penalty from the employer.[54]

It does not seem a coincidence that one of the three most powerful unions—the ALPA—resorts most frequently to the strike threat.[55] And there is strong evidence that this tactic is used most frequently against the smaller airlines, such as local-service and territorial carriers. Then, after the union has gained acceptance of its demand by a smaller carrier, it uses this gain to win a similar concession from the rest of the industry. Moreover, it is of considerable help to the union in a contract dispute with a major line to be able to publicize the fact that this large carrier is "behind" other segments of the industry in its treatment of its employees—the basis for this assertion being, of course, the union's earlier success against the weaker airlines. This, of course, forms the jet-age version of the familiar "whipsaw" technique.

Obviously, the relative strengths of management and labor determine whether this version of the "whipsaw" is successful; but in a contest with employees receiving salaries as high as $33,000, annually,[56] management's posture is noticeably weak. On the other hand, this lack of strength does not characterize management's relations with airline labor as a whole. If, then, management further girds its loins in order better to cope with the more powerful segments of labor, what will be the reaction of the less powerful segments, now represented by the smaller airline unions? These unions, although often affiliated with powerful unions, usually get little more than general guidance or advice from their big brothers. Faced with a management that has been geared to do battle with large organizations like the

[54] "Since a widely-publicized strike threat results in immediate uncertainty and inconvenience to the public and produces a direct loss in business to the company (one major airline estimates a 10% loss in business after each such threat), it occupies a unique role in such as the airline industry. In impact, it differs from an actual strike only in degree—both cause a permanent loss of business. Repeated strike threats to a single company, not a rare occurrence, can prove more damaging financially to that company in some instances than an actual strike of limited duration." AIR TRANSPORT ASS'N OF AMERICA, RECENT DEVELOPMENTS IN AIRLINE LABOR-MANAGEMENT RELATIONS 5 (1959).

[55] Of 45 actual strike threats, as measured by the setting of strike dates apart from those that resulted in strikes, during the period 1946-58, 29 were set by the ALPA; 8 by the IAM; 2 by the Air Line Agents Ass'n; and 1 each by three other unions. Six Carrier Mutual Aid Pact Approval Proceedings, No. 9977, Brief on Behalf of American Airlines *et al.*, CAB, Jan. 5, 1959, app. D, table 4.

[56] Senior pilots flying jet aircraft the maximum 85 hours per month can earn up to $33,600 a year under new jet-age pilot contracts.

ALPA, will these smaller unions seek to improve their own relative bargaining position by harkening to the overtures of those who would exploit this situation?

The chaos in airline labor relations has proved tempting to the Teamsters and has encouraged their infiltration into the industry. As previously noted, the Teamsters were certified as bargaining representatives for Pan American's stock clerks. In the November 1958 strike by Lake Central Airlines' stewardesses, the picket line, ignored by virtually all others, was observed by the Teamsters. In the flight engineers' dispute which shut down Eastern in late 1958, the relatively small FEIA received certain financial support from the Teamsters.[57] Although both management and numerous airline unions decry this development, its growth is becoming increasingly rapid and ominous.

CONCLUSION

The advent of jet aircraft has exacerbated many of the problems of airline labor relations. Small airline unions, beset by fears of technological unemployment or dislocation, will probably consolidate in order to protect their position. Accordingly, the Teamsters may make substantial inroads unless union-management friction can be minimized or the larger airline unions attempt to forestall this penetration of the air industry. Management, meanwhile, will continue to look to such measures as "mutual aid" to meet with such powerful unions as the ALPA, the IAM, and the TWU on more equal terms. If management is successful in this endeavor, however, some labor quarters may invite greater government intervention in, and perhaps even outright regulation of, airline labor relations.

The existing dispute-settlement procedure prescribed by the Railway Labor Act has not been notably successful as translated to the airline industry, although the use of emergency boards under the authority of the Act has apparently sometimes shortened strikes. Nor is compulsory arbitration a meaningful alternative. The matter should, therefore, be given serious study by all concerned, with a view toward formulating and effecting the changes that experience has indicated are necessary. During the 1930's, airline labor relations took step one when the Railway Labor Act was made applicable to commercial aviation. Now, as part of the dynamic jet age, step two must be taken. This must not be done lightly, selfishly, or carelessly. The industry is too vital to the future of our country.

[57] Also, in Feb. 1959, the Teamsters established a picket line at Newark Airport in an attempt to gain recognition as the representative for certain employees of the Flying Tiger Line who are currently represented by the IAM.

A STUDY OF AMERICAN MERCHANT MARINE LEGISLATION

CLARENCE G. MORSE*

The main body of our national merchant marine legislation is found in the Merchant Marine Act of 1936, as amended.[1] However, that Act was preceded by other acts, some of whose provisions are still in effect as important parts of our merchant marine policy.

I

THE FIRST COMPREHENSIVE PROGRAM—THE SHIPPING ACT OF 1916, AS AMENDED

The Shipping Act of 1916,[2] was designed to secure an American merchant marine which would be adequate for the needs of our national defense and our commerce, and to regulate competitive practices in ocean shipping for the protection of shippers, importers, exporters, carriers, and the public. The United States Shipping Board set up by the Act was authorized, with the approval of the President,[3]

> to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels.

The Board was further authorized, if unable to charter, lease, or sell to American citizens these and other vessels acquired by it, to form a corporation "for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States."[4]

Another important feature of the Shipping Act of 1916 is its regulatory provisions,[5] which are operative today and are exercised by the Federal Maritime Board. Some aspects of this regulatory jurisdiction have been discussed in detail elsewhere in this symposium.[6] These regulatory provisions prohibit common carriers by water from retaliating or unfairly or unjustly discriminating against shippers, and relate generally to the regulation and control of various rates, services, practices, and agree-

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[1] 49 Stat. 1985, as amended, 46 U.S.C. §§ 1101-294 (1952).

[2] 39 Stat. 728, 46 U.S.C. §§ 801-42 (1952).

[3] 39 Stat. 730.

[4] 39 Stat. 731.

[5] 39 Stat. 733-38, 46 U.S.C. §§ 812-31 (1952).

[6] Seaver & Schmeltzer, *The Role of Conferences and the Dual Rate System in Ocean Foreign Trade*, 24 LAW & CONTEMP. PROB. 605 (1959).

ments of common carriers by water and of "other persons" as defined in the Act. Since the transfer by the Transportation Act of 1940[7] of jurisdiction over water carriers in interstate commerce to the Interstate Commerce Commission, the regulatory jurisdiction over water carriers conferred by the Shipping Act of 1916, as amended, upon the Shipping Board and its successors has been exercised only over carriers in American foreign or noncontiguous domestic trade.

Section two of the Shipping Act of 1916[8] defines "citizen of the United States" for the purpose of that Act, and by reference[9] defines it for the purposes of the Merchant Marine Act of 1920,[10] as amended, the Merchant Marine Act of 1936, as amended, and the Merchant Ship Sale Act of 1946, as amended.[11] It provides that

> no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

It further provides that the "controlling interest" or "75 per centum interest" requirements will apply to legal title, beneficial interest, voting power, and actual control. The Eighty-fifth Congress[12] enacted somewhat less strict "citizenship" standards to apply under certain circumstances (overriding the 1916 Act's definition in those instances) with respect to section twenty-seven of the Merchant Marine Act of 1920[13] (cargo transport in domestic trade), and sections nine and thirty-seven of the Shipping Act of 1916, as amended (transfer to foreign flag, ownership, or control).[14]

These last-named provisions of the Shipping Act of 1916, as amended, are currently of special importance. Section nine generally prohibits any sale, mortgage, lease, charter, delivery, or other transfer to a person not an American citizen or the placing under foreign flag or registry of any vessel or any interest therein owned wholly or partly by an American citizen and documented under the laws of the United States without the approval of the Maritime Administration. Section thirty-seven is a broader provision of a similar nature, only effective when the United States is at war or during a national emergency proclaimed by the President, which

[7] 54 Stat. 950, 49 U.S.C. § 920 (1952).

[8] 39 Stat. 729, as amended, 46 U.S.C. §§ 802, 803 (1952).

[9] 49 Stat. 2016 (1936), 46 U.S.C. § 888 (1952); 66 Stat. 765, 46 U.S.C. § 1244(c) (1952); 64 Stat. 1276, 1277 (1950), 50 U.S.C. App. § 1736(g) (1952). But with reference to a corporation under title XI of the 1936 Act, all directors must be United States citizens. 73 Stat. 597 (1959).

[10] 41 Stat. 988, 46 U.S.C. §§ 861-89 (1952).

[11] 60 Stat. 41, 50 U.S.C. App. §§ 1735-46 (1952).

[12] 72 Stat. 1736, 46 U.S.C.A. § 883-1 (Supp. 1958).

[13] 41 Stat. 999, 46 U.S.C. § 883 (1952).

[14] 39 Stat. 730, 46 U.S.C. § 808 (1952); 40 Stat. 901 (1918), 46 U.S.C. § 835 (1952).

additionally extends to shipyards, dry-docks, ship-building or ship-repairing facilities, and ship-construction contracts.

The Maritime Administration, in approving the transfer of a vessel to a foreign owner or foreign flag under these provisions, considers the need for retention of the vessel involved under the American flag or American ownership, and also considers the extent to which the United States will have effective control over the transferred vessel or the foreign owner. Type, size, speed, general condition, and age of the vessel, as well as the acceptability of the prospective foreign buyer or foreign flag are all taken into account. The important considerations are national defense, maintenance of an adequate American merchant marine, American foreign policy, and the national interest. Generally the approval of the transfer to a foreign flag or owner is not granted as to a large American-flag vessel under twenty years of age unless the American transferring owner agrees to replace the transferred vessel or vessels by the construction of a new vessel or vessels in an American shipyard for American documentation and operation, the new ship or ships to be of size, type, design, speed, and carrying capacity acceptable to the Maritime Administrator. In permitting American ships to be transferred to foreign ownership and registry, the Maritime Administration, in some cases, imposes other conditions on the owner of the foreign-flag ship and on the ship itself which are designed to retain for the United States a certain measure of "effective control" over such ship, in order that it may be available to the United States in the event of national emergency.

II

THE NEXT STEP—PRIVATE OPERATION OF WORLD WAR I FLEET UNDER THE MERCHANT MARINE ACT OF 1920, AS AMENDED

One of the primary purposes of the Merchant Marine Act of 1920 was to sell, to American citizens if possible, the large fleet of World-War-I-built merchant ships then in the hands of the Government. In addition, the Act declared it to be national policy to develop and maintain a sufficient American merchant marine "ultimately to be owned and operated privately by citizens of the United States."[15] Section seven of this Act provided that,[16]

> the Board is authorized and directed to investigate and determine as promptly as possible after the enactment of this Act and from time to time thereafter what steamship lines should be established and put in operation from ports in the United States or any Territory, District, or possession thereof to such world and domestic markets as in its judgment are desirable for the promotion, development, expansion, and maintenance of the foreign and coastwise trade of the United States and an adequate postal service, and to determine the type, size, speed, and other requirements of the vessels to be employed upon such lines and the frequency and regularity of their sailings, with a view to furnishing adequate, regular, certain, and permanent service.

[15] 41 Stat. 988, 46 U.S.C. § 861 (1952).
[16] 41 Stat. 991, 46 U.S.C. § 866 (1952).

The Board is authorized to sell, and if a satisfactory sale cannot be made, to charter such of the vessels . . . acquired by the board, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the Board may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the board, the board shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line cannot be made self-sustaining. . . .

Other major provisions of the Merchant Marine Act of 1920 were sections eleven and twenty-four.[17] Section eleven provided that,

during a period of five years from the enactment of this Act the board may annually set aside out of the revenues from sales and operations a sum not exceeding $25,000,000, to be known as its construction loan fund, to be used in aid of the construction of vessels of the best and most efficient type for the establishment and maintenance of service on steamship lines deemed desirable and necessary by the board, and such vessels shall be equipped with the most modern, the most efficient, and the most economical machinery and commercial appliances. The board shall use such fund to the extent required upon such terms as the board may prescribe to aid persons, citizens of the United States, in the construction by them in private shipyards, in the United States of the foregoing class of vessels. No aid shall be for a greater sum than two-thirds of the cost of the vessel or vessels to be constructed, and the board shall require such security, including a first lien upon the entire interest in the vessel or vessels so constructed as it shall deem necessary to insure the repayment of such sum with interest thereon and the maintenance of the service for which such vessel or vessels are built.

Section twenty-four provided that,

all mails of the United States shipped or carried on vessels shall, if practicable, be shipped or carried on American-built vessels documented under the laws of the United States. No contract hereafter made with the Postmaster General for carrying mails on vessels so built and documented shall be assigned or sublet, and no mails covered by such contract shall be carried on any vessel not so built and documented. No money shall be paid out of the Treasury of the United States on or in relation to any such contract for carrying mails on vessels so built and documented when such contract has been assigned or sublet or when mails covered by such contract are in violation of the terms thereof carried on any vessel not so built and documented. The board and the Postmaster General, in aid of the development of a merchant marine adequate to provide for the maintenance and expansion of the foreign or coastwise trade of the United States and of a satisfactory postal service in connection therewith, shall from time to time determine the just and reasonable rate of compensation to be paid for such service, and the Postmaster General is hereby authorized to enter into contracts within the limits of appropriations made therefor by Congress to pay for the carrying of such mails in such vessels at such rate.

Parts of the Merchant Marine Act of 1920, as amended, are still in effect. These effective provisions include section thirty of the Ship Mortgage Act of 1920,[18] which

[17] 41 Stat. 993 (repealed June 29, 1936); 41 Stat. 998, 46 U.S.C. § 880 (1952).
[18] 41 Stat. 1000, 46 U.S.C. § 911 (1952).

establishes the requirements and effects of a "preferred mortgage," and section twenty-seven,[19] which generally prohibits the transportation by water of merchandise between points in the United States, its districts, territories, and possessions in any vessel other than one built in and documented under the laws of the United States and owned by persons who are American citizens. A similar provision prohibits the transportation of passengers between ports or places in the United States in a foreign vessel.[20] Under section nineteen of the 1920 Act,[21] the FMB is authorized to make certain rules and regulations affecting shipping in the foreign trade and to take action to secure the approval, suspension, modification, or annulment of certain rules or regulations of other federal agencies affecting shipping in the foreign trade.

III

THE MERCHANT MARINE ACT OF 1928—BROADENED EXISTING STATUTES

The Merchant Marine Act of 1928[22] increased the size of the construction loan fund provided for by the Merchant Marine Act of 1920; enabled loans to be made therefrom for equipping, reconditioning, remodeling, or improving vessels as well as for constructing vessels; and raised the loan limitation from two-thirds of the cost of the vessel to be constructed to three-fourths of the cost of the vessel construction, equipment, reconditioning, remodeling, or improvement. The 1928 Act further provided that officers or employees of the United States traveling on official business overseas shall travel on American-flag ships when available.

The Merchant Marine Act of 1928 also broadened the ocean-mail provisions of the Merchant Marine Act of 1920 by authorizing the Postmaster General to enter into contracts with American citizens for terms not to exceed ten years. A statutory schedule of vessel classifications and compensation was set out to apply to payments for ocean-mail service. For instance, vessels capable of maintaining a speed of eighteen knots at sea in ordinary weather and of a gross registered tonnage of not less than 12,000 tons were Class 3 vessels and entitled to eight dollars per nautical mile; vessels capable of maintaining a speed of twenty knots at sea in ordinary weather and of a gross registered tonnage of not less than 16,000 tons were Class 2 vessels and entitled to ten dollars per nautical mile for providing ocean-mail service. In addition, the ocean-mail contracts authorized under the 1928 Act provided for a fixed minimum number of trips a year, at regular intervals, over a prescribed route, with vessels of prescribed types, sizes, and speeds, as determined by the needs of each particular service. Vessels, to be eligible for mail contracts, had either to be constructed according to plans and specifications approved by the Secretary of the Navy with particular reference to economical conversion into an auxiliary

[19] 41 Stat. 999, 46 U.S.C. § 883 (1952).
[20] 24 Stat. 81 (1886), as amended, 46 U.S.C. § 289 (1952).
[21] 41 Stat. 995, 46 U.S.C. § 876 (1952).
[22] 45 Stat. 689, 46 U.S.C. § 891 (1952).

naval vessel, or to be otherwise useful to the United States in time of national emergency. Section 405(c) of the 1928 Act further provided that[23]

> . . . from and after the enactment of this Act . . . and for a period for four years, upon each departure from the United States of a vessel employed in ocean mail service under this title, one-half of the crew (crew including all employees of the ship other than officers) shall be citizens of the United States and, thereafter, two-thirds of the crew as above defined shall be citizens of the United States.

Further requirements of the Merchant Marine Act of 1928 were that vessels receiving loans from the construction loan fund or in respect of which ocean-mail contracts were made were obligated to remain documented under the American flag for not less than twenty years. These vessels were also subject to being taken and purchased or used by the United States for national defense or during any national emergency declared by proclamation of the President; and in such event, the owner would be paid only the fair actual value of the vessel or use at the time of the taking, without either enhancement by the causes necessitating the taking or any consequential damages.

IV

THE "MAGNA CARTA" OF THE AMERICAN MERCHANT MARINE—THE MERCHANT MARINE ACT OF 1936

On March 4, 1935, the President sent to Congress a merchant marine message that stated:[24]

> I present to the Congress the question of whether or not the United States should have an adequate merchant marine.
>
> To me there are three reasons for answering this question in the affirmative. The first is that in time of peace subsidies granted by other nations, shipping combines, and other restrictive, or rebating methods may well be used to the detriment of American shippers. The maintenance of fair competition alone calls for American flagships of sufficient tonnage to carry a reasonable portion of our foreign commerce.
>
> Second, in the event of a major war in which the United States is not involved, our commerce, in the absence of an adequate American merchant marine, might find itself seriously crippled because of its inability to secure bottoms for neutral peaceful foreign trade.
>
> Third, in the event of a war in which the United States itself might be engaged, American flagships are obviously needed not only for naval auxiliaries, but also for the maintenance of reasonable and necessary commercial intercourse with other nations. We should remember lessons learned in the last war.
>
> In many instances in our history the Congress has provided for various kinds of disguised subsidies to American shipping. In recent years the Congress has provided this aid in the form of lending money at low rates of interest to American shipping companies for the purpose of building new ships for foreign trade. It has, in addition, appropriated large annual sums under the guise of payments for ocean-mail contracts.

[23] 45 Stat. 693 (repealed June 29, 1936).

[24] *Message from President of the United States Transmitting Views and Two Reports on Subject of Adequate Merchant Marine*, H.R. Doc. No. 118, 74th Cong., 1st Sess. 1-3 (1935).

This lending of money for shipbuilding has in practice been a failure. Few ships have been built and many difficulties have arisen over the repayment of the loans. Similar difficulties have attended the granting of ocean-mail contracts. The Government today is paying annually about $30,000,000 for the carrying of mails which would cost, under normal ocean rates, only $3,000,000. The difference, $27,000,000, is a subsidy, and nothing but a subsidy. But given under this disguised form it is an unsatisfactory and not an honest way of providing the aid the Government ought to give to shipping.

I propose that we end this subterfuge. If the Congress decides that it will maintain a reasonably adequate American merchant marine, I believe that it can well afford honestly to call a subsidy by its right name.

Approached in this way a subsidy amounts to a comparatively simple thing. It must be based upon providing for American Shipping government aid to make up the differential between American and foreign shipping costs. It should cover first the difference in the cost of building ships; second, the difference in the cost of operating ships; and finally, it should take into consideration the liberal subsidies that many foreign governments provide for their shipping. Only by meeting this threefold differential can we expect to maintain a reasonable place in ocean commerce for ships flying the American flag, and at the same time maintain American standards. . . .

An American merchant marine is one of our most firmly established traditions. It was, during the first half of our national existence, a great and growing asset. Since then it has declined in value and importance. The time has come to square this traditional ideal with effective performance.

Free competition among the nations in the building of modern shipping facilities is a manifestation of wholly desirable and wholesome national ambition. In such free competition the American people want us to be properly represented. The American people want to use American ships. Their Government owes it to them to make certain that such ships are in keeping with our national pride and national needs.

In response to the President's message, Congress enacted the Merchant Marine Act of 1936. This Act, as amended, still forms the basic legislation for effectuating our national merchant marine policy. That policy, which is set out in section 101 of the Act, states:[25]

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

This statement recognizes that aside from national defense, the entire American economy benefits from the maintenance of a healthy merchant marine. The United

[25] 49 Stat. 1985, 46 U.S.C. § 1101 (1952).

States could not maintain its position of world leadership if the flow of foreign commerce were severely restricted or eliminated. Without an American-flag merchant fleet, American traders would be at the mercy, commercially, of foreign-flag lines. An adequate American fleet can only be maintained through government aid of various kinds.

Another important aspect of our merchant marine policy which is recognized in various provisions of the Merchant Marine Act of 1936 and in other legislation is the encouragement and maintenance of sufficient American shipyards, ship-building facilities, ship-repairing facilities, and skilled shipyard personnel to carry out the purposes and policies of the Act and to provide an adequate mobilization base at strategic points for purposes of national defense and national emergency. Section 502(f) of the Act, for example, authorizes the FMB to allocate construction projects on this mobilization basis.[26]

To carry out the policies and provisions of the Merchant Marine Act of 1936, section 201 established the United States Maritime Commission,[27] and section 204 transferred to the Commission all the functions, powers, and duties vested in the United States Shipping Board by the Shipping Act of 1916, the Merchant Marine Act of 1920, and the Merchant Marine Act of 1928.[28] The United States Maritime Commission was abolished by Reorganization Plan 21 of 1950,[29] effective May 24, 1950. The plan established the Maritime Administration and the FMB as agencies in the Department of Commerce, and all the functions of the Maritime Commission and its chairman were transferred under the plan to the Secretary of Commerce, except those specifically placed under the jurisdiction of the FMB. The Secretary of Commerce may delegate any or all of his functions authorized under the reorganization plan to the Maritime Administrator, which he has since done. Reorganization Plan 21 also provided that the FMB Chairman, who is designated by the President, shall be the Maritime Administrator, and thus he serves in a dual capacity.

The Maritime Administrator investigates and determines ocean services, routes, and lines essential for the development and maintenance of American foreign commerce; and the type, size, speed, and other requirements of ships which should be employed on such routes or lines, and the frequency and regularity of sailings of such vessels required to provide adequate service on such routes. The FMB finds the extent and character of aids and subsidies granted by foreign governments to their merchant marines, and determines construction and operating-differential subsidies on the basis of the comparative cost of construction and operation of ships in the United States and in foreign countries, subject to the limitations of the Merchant Marine Act of 1936.

[26] 49 Stat. 1996, 46 U.S.C. § 1152(f) (1952).
[27] 49 Stat. 1985, 46 U.S.C. § 1111 (1952).
[28] 49 Stat. 1987, 46 U.S.C. § 1114 (1952).
[29] 64 Stat. 1273.

The Maritime Administration administers the provisions of all subsidy contracts of the FMB. It also aids in the construction, reconditioning, and reconstruction of ships by insuring private construction loans and mortgages made to finance the construction or conversion of American ships; makes payment of the cost, as determined by the FMB, of national defense features added to ships; and acquires obsolete ships in exchange for allowances of credit on the construction of new ships.

V

AIDS FOR CONSTRUCTION—TITLE FIVE OF THE MERCHANT MARINE ACT OF 1936

A. Construction Subsidy

The general purpose of the construction differential subsidy provisions of title five of the Merchant Marine Act of 1936[30] is to place the American-built and operated ship in a position of parity with its foreign competitors, in so far as the cost of the ship is concerned. This assistance is granted in recognition of the fact that the American-flag operator of an American-built ship in the foreign commerce of the United States is at a capital disadvantage compared with the foreign-built ship of his foreign competitor. The higher wages and prices in the United States account for the higher cost of American-built ships. The construction-differential subsidy makes it possible for the American operator to acquire an American-built ship at a price for which he could purchase his ship in a foreign shipyard. In one sense, this program actually provides the subsidy for the American shipyards.

Sections 501, 502, and 504 of the Merchant Marine Act of 1936 authorize the FMB to grant a construction-differential subsidy aid to American citizens in the construction of new vessels to be used in the foreign commerce of the United States.[31] While under the act as passed in 1936 such aid was limited to vessels to be used on an essential service, route, or line in American foreign commerce, amendments adopted in 1952 authorized the granting of such aid in connection with the construction of any vessel to be used in American foreign commerce.[32]

This construction-differential-subsidy aid may equal but not exceed the difference between the cost of constructing the proposed vessel in an American shipyard and the fair and reasonable estimate of cost, as determined by the Board, of the construction of the proposed vessel, using similar plans and specifications, in a foreign shipbuilding center. The construction-differential subsidy cannot exceed fifty per cent of the American construction cost of the vessel (excluding the cost of national-defense features). As the disparity between American and foreign costs increases, the subsidy has approached nearer and nearer this limit; in 1959, the subsidy was approximately forty-eight per cent for the construction of a new vessel.

The cost of national defense features is determined by the Board and paid by the Government in addition to the subsidy. National defense features are those which

[30] 49 Stat. 1995, 46 U.S.C. §§ 1151-61 (1952).
[31] 49 Stat. 1995, 1996, 1998, 46 U.S.C. §§ 1151, 1152, 1154 (1952).
[32] 49 Stat. 2001, as amended, 66 Stat. 765, 46 U.S.C. §§ 1171-82 (1952).

are certified by the Secretary of the Navy as useful for national defense purposes and which are determined by the Board to be either in excess of commercial requirements or disproportionate in cost to their commercial utility. The plans and specifications of the proposed vessel must receive Navy Department approval to ensure that it will be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency.

In approving applications for construction-differential subsidy aid, section 501 of the Merchant Marine Act of 1936 requires that the Board determine that: (1) the plans and specifications call for a new vessel which will meet the requirements of American foreign commerce, will aid in the promotion and development of such commerce, and will be suitable for national defense or military purposes in time of war or national emergency; (2) the applicant possesses the ability, experience, financial resources, and other qualifications to operate and maintain the proposed vessel; and (3) the granting of the aid is reasonably calculated to replace worn or obsolete tonnage with new and modern ships, or otherwise carry out effectively the purposes and policies of the Act.

Construction-differential subsidy aid may also be granted in connection with the reconstruction or reconditioning of an existing vessel that is to be used in the foreign commerce of the United States. However, this aid may be granted only in exceptional cases, after thorough study and a formal determination that the proposed reconstruction or reconditioning is consistent with the purposes and policies of the Merchant Marine Act of 1936.

Under sections 503 and 504 of the Merchant Marine Act of 1936, any vessel with respect to which a differential subsidy is granted must remain documented under the laws of the United States for not less than twenty years or so long as any principal or interest on account of the purchase price is due the United States, whichever is the longer period.[33] Section 506 of the Act provides that every owner of a vessel for which a construction-differential subsidy has been paid must agree that the vessel shall be operated in foreign trade or on a round-the-world voyage, and that if the vessel is operated in the domestic trade, he will pay annually to the Board such portion of one-twentieth of the construction-differential subsidy paid for the vessel as the gross revenue derived from the domestic trade bears to the gross revenue from the entire voyages completed during the preceding year.[34] The Board may allow domestic use of such a vessel for periods not exceeding six months in any year, but the owner must pay to the Board an amount which bears the same proportion to the construction-differential subsidy paid for such vessel as such temporary period bears to the entire economic life of the vessel.

Under the provisions of sections 802 and 902 of the Merchant Marine Act of 1936, vessels upon which a construction-differential subsidy has been paid may be pur-

[33] 49 Stat. 1997-98, 46 U.S.C. §§ 1153, 1154 (1952).
[34] 49 Stat. 1999, 46 U.S.C. § 1156 (1952).

chased or requisitioned by the United States during a national emergency or when the security of the national defense makes it advisable.[35] In such a case, the payment to the owner cannot exceed the actual depreciated construction cost of the vessel (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national defense features), less the depreciated amount of construction-differential subsidy paid on the vessel, or the fair and reasonable scrap value of such vessel as determined by the Board, whichever is the greater.

Section 505 of the Merchant Marine Act of 1936 provides that all construction in respect of which a construction-differential subsidy is allowed must be performed in a shipyard within the continental limits of the United States, following competitive bidding, after due advertisement.[36] In all such construction, the ship-builder, subcontractors, materialmen, and suppliers must use, so far as practicable, only articles, materials, and supplies of the growth, production, or manufacture of the United States. Sections 502 and 509 of the Act allow Pacific coast shipyards a six per cent margin over Atlantic and Gulf coast shipyards in competitive bidding involving the construction or reconditioning of a vessel to be operated from the Pacific coast of the United States for an applicant who has his principal place of business on the Pacific coast of the United States.[37] In addition, upon the basis of a finding that the award of the proposed construction, reconstruction, reconditioning, or remodeling work will remedy an existing inadequacy in our national defense mobilization base as to the capabilities and capacities, including facilities and skilled personnel, of a shipyard or shipyards for merchant ship construction, section 502 allows, with the approval of the President, allocation of the work to such yard or yards, without regard to the provisions requiring awarding of contracts to the lowest bidder.

In connection with the granting of construction-differential subsidy, section 502 of the Act further provides for FMB construction of the vessel. In such a situation, the Board pays to the shipyard the contract price of the ship and an appropriation is made by Congress for the full cost of the ship. The ship is then sold by the Board to the American operator at a price equal to the estimated foreign cost of the ship. The purchaser pays twenty-five per cent of the sales price, with the balance secured by a mortgage, payable in twenty equal annual installments, at an interest rate of 3.5 per cent. A similar procedure is followed under section 509 of the Act, which authorizes aid in the form of payment for national defense features (without a construction-differential subsidy) for new vessels to be operated in the foreign or domestic trade. These provisions have not been used in recent years, however, as private financing has been favored.

Another means by which the Board may enter into contracts with purchasers for the building of new ships is provided by section 504 of the Merchant Marine Act of 1936, under which construction-differential aid may be granted for the construction of a ship by an American shipyard for the direct account of an American

[35] 49 Stat. 2011, 2015, 46 U.S.C. §§ 1212, 1242 (1952).
[36] 49 Stat. 1998, 46 U.S.C. § 1155 (1952).
[37] 49 Stat. 1996, 2000, 46 U.S.C. §§ 1152, 1159 (1952).

operator. In such a case, the operator is responsible for the payments to the shipbuilder and for the financing of the cost of the ship to him. The Government pays only the construction subsidy aid and does not provide mortgage financing for the balance of the cost. Accordingly, smaller appropriations by the Congress are required. For this reason, and since recent amendments to title eleven of the Act (discussed below)[38] have facilitated private financing of the operator's purchase price, this latter method of financing the ship construction costs of the operator is currently preferred.

B. Trade In

Sections 507 and 510 of the Merchant Marine Act of 1936 as amended, provide the statutory authorities for the trade-in of old ships to the Government as an inducement to the owners to replace such ships through new construction. Section 507 authorizes the acceptance of obsolete vessels as a trade-in, in part payment for a replacement vessel to be constructed and sold to the owner under title five of the Act.[39] This section, in effect, establishes the book value of the ship to the owner or its former owner as the basic factor to be considered in determining the amount of allowance for the traded-in ship. It was found that section 507 did not have the desired effect, and that old and obsolete tonnage was being continued in operation, to the detriment of the merchant marine program. As a result, there was added to the Act in 1939 section 510, which established a new principle for determining the allowance of credit for a traded-in ship.[40] It requires consideration of three factors in determining a fair and reasonable value—namely, the scrap value of the obsolete vessel both in American and foreign markets, the depreciated value based on a twenty-year life, and the market value of the obsolete vessel for operation in world trade or in the foreign or domestic trade of the United States. Section 510 allows trade-in credit towards both new ships constructed under the provisions of the Merchant Marine Act of 1936 and new ships otherwise constructed in American shipyards for private account and documentation under the American flag. Section 510 as originally enacted provided that "obsolete vessels" could not be less than seventeen years old; later legislation, however, effective only until June 30, 1962, has redefined the term "obsolete vessel" so as to make twelve-year-old vessels eligible for trade-in.[41] If the owner of the obsolete vessel uses such vessel during the period of construction of the new vessel, the trade-in allowance is reduced by an amount representing the fair value of such use.

Ships traded in to the Government are placed in the National Defense Reserve Fleet. This fleet was created by section eleven of the Merchant Ship Sales Act of 1946[42] and also contains war-built government vessels not sold under the provisions of that Act. The primary purpose of the reserve fleet, as established by law, is to

[38] 52 Stat. 968 (1938), 66 Stat. 765 (1952), 46 U.S.C. §§ 1271-79 (1952); see pt vii *infra*.
[39] 49 Stat. 2000, 46 U.S.C. §§ 1157 (1952).
[40] 53 Stat. 1183 (1939), 46 U.S.C. § 1160 (1952).
[41] 66 Stat. 762 (1952), 72 Stat. 17, 46 U.S.C. § 1160 (Supp. 1958).
[42] 60 Stat. 49, 50 U.S.C. App. § 1744 (1952).

provide, after consultation with the appropriate military authorities, a reserve of vessels of sufficient value for commercial and national defense purposes to warrant their maintenance and preservation. It is prescribed that unless otherwise provided for by law, all vessels placed in such reserve are to be preserved and maintained for the purposes of national defense. The suitability with respect to size, composition, and speed of the reserve fleet for military purposes is determined jointly by the Maritime Administration and the Navy, based on an annual statement of requirements from the Joint Chiefs of Staff. In addition, the reserve fleet provides a reservoir of useful tonnage to meet special governmental and commercial requirements. Today there are approximately 2,090 vessels at eight fleet sites located at various points around the three coasts.

Section eleven of the Merchant Ship Sales Act of 1946 provides that reserve fleet vessels may be operated "for account of any agency or department of the United States" during periods of national emergency.[43] Section 5(e) of the Act, as amended, further provides that reserve fleet dry cargo vessels may be chartered on bareboat terms to American citizens for services which, in the opinion of the FMB, are required in the public interest, are not adequately served, and for which privately-owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates.[44]

Section 510(h) of the Merchant Marine Act of 1936, the tanker trade-in-and-build program, which was enacted in 1954 and which expired on July 1, 1958, authorized the Secretary of Commerce to acquire tankers not less than ten years old in exchange for an allowance of credit towards the purchase of a new American-flag tanker.[45] The purpose of this program was to obtain tankers desirable for inclusion in the national defense reserve for use in the event of a national emergency and also to promote the private construction of new tankers in line with national defense requirements.

C. Tax Advantages—The Construction Reserve Fund

Any American operator in the foreign or domestic commerce of the United States is authorized under section 511 of the Merchant Marine Act of 1936, as amended, to establish a construction reserve fund.[46] In this fund, the operator may deposit (a) proceeds from the sale of ships, (b) indemnities for the loss of ships, (c) earnings derived from the operation of ships documented under the laws of the United States, and from services incident to such operation, and (d) interest or other earnings upon amounts previously deposited. Since section 607 of the Act requires an operator in American foreign commerce who is receiving an operating-differential subsidy to establish a "capital reserve fund" and a "special reserve fund,"[47] these operators do not establish construction reserve funds. As to the deposit of proceeds

[43] *Ibid.*
[44] 64 Stat. 308 (1950), 50 U.S.C. App. § 1738(e) (1952).
[45] 68 Stat. 680 (1954), 46 U.S.C. § 1160(h) (Supp. V, 1958).
[46] 54 Stat. 1106 (1950), 46 U.S.C. § 1161 (1952).
[47] 49 Stat. 2005, 46 U.S.C. § 1177 (1952).

from the sale of a ship or proceeds from insurance on a lost ship, the operator who establishes a construction reserve fund may elect in his federal income tax returns to treat any gain on such sale or insurance recovery as not recognized. However, in such a case, the tax basis of vessels acquired or improved with money from the construction reserve fund is reduced by an amount equal to the unrecognized gain; and since ordinary income is now taxed at higher rates than long-term capital gains, it is usually not advantageous taxwise to make the election permitted by section 511, in light of the fact that deductions for depreciation (offsets against ordinary income) on the new vessel will be accordingly reduced. As to the deposit of earnings derived from the operation of ships and service incidental thereto and the interest or earnings upon amounts deposited, no tax benefits are afforded other than an exemption from the prohibition of the Internal Revenue Code against unreasonable accumulation of funds. In order to secure the tax deferral on gain from the sale of ships or insurance on lost ships, the moneys deposited in the construction reserve fund must be used within a specified time for the acquisition of a new ship, in the reconditioning or reconstruction of a ship, or in the liquidation of indebtedness covered by a purchase money mortgage on a new vessel. If the moneys deposited in the fund are not used as indicated above within the prescribed time, or if they are withdrawn for other purposes, the amount of the untaxed gain is taxable as of the year in which realized and the exemption from the prohibition against unreasonable accumulation of funds no longer applies.

VI

AIDS FOR OPERATION—TITLE SIX OF THE MERCHANT MARINE ACT OF 1936

Because of the differences between certain American-flag and foreign-flag operating costs, especially for labor, it is necessary to provide operators of liner ships registered under United States laws with subsidies sufficient to place them in a position of approximate cost parity with their foreign competitors. Section 601 of the Merchant Marine Act of 1936 authorizes the FMB to consider the applications of citizens of the United States for financial aid in the operation of vessels on essential American foreign-trade routes.[48] No such application may be approved by the Board unless it finds that: (1) the operation of such vessel or vessels in such essential service, route, or line is required to meet foreign-flag competition and to promote American foreign commerce, and the vessels were built in the United States; (2) the applicant owns, or can and will build or purchase, vessels of the size, type, speed, and number and with the proper equipment required to enable him to operate and maintain the service, route, or line in such manner as may be necessary to meet competitive conditions and to promote American foreign commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessels so as to meet competitive conditions and promote American foreign commerce; and (4) the granting of the

[48] 49 Stat. 2001, 46 U.S.C. § 1171 (1952).

aid is necessary to place the proposed operation of the vessels on a parity with those of foreign competitors and is reasonably calculated to carry out effectively the purposes and policies of the Act.

With regard to trade routes, section 211 of the Merchant Marine Act of 1936 authorizes and directs the Maritime Administrator to investigate, determine, and keep current records of[49]

> the ocean services, routes, and lines from ports in the United States . . . to foreign markets, which are, or may be . . . essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States . . . [the Maritime Administration] shall consider and give due weight to . . . the number of sailings and types of vessels that should be employed in such lines and any other facts and conditions that a prudent businessman would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States and the national defense.

Thirty-three trade routes and three services are currently designated as essential in American foreign commerce.

Under section 603, of the Merchant Marine Act of 1936, the FMB may approve an application to serve an essential trade route and enter into a long-term operating subsidy contract, not to exceed twenty years, with the applicant.[50] The operator agrees to furnish adequate and regular service, as provided in the contract. The contract does not guarantee subsidized operators a profit. It is designed to insure continuity of service on the route and contains an agreement by the operator to replace obsolete vessels with modern vessels constructed in American shipyards. The Board agrees to pay an operating-differential subsidy equal to

> the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, wages, and subsistence of officers and crews, and any other items of expense in which the . . . [Board] shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense . . . if such vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessels covered by the contract.

Payments are determined and stated as percentages of certain specified subsidizable expenses of an American operator. Separate rates are determined for each type of such expense for each type of vessel on each trade route, after taking into consideration each principal foreign-flag competitor. The process of calculating these rates is complex and requires a large amount of foreign-cost information which must be maintained on a current basis.

There are many conditions attached to the granting of an operating-differential subsidy. A subsidy will not be paid on account of the operation of any vessel which has not been built in a domestic yard. In addition, the vessel must be constructed

[49] 49 Stat. 1989, 46 U.S.C. § 1121 (1952).
[50] 49 Stat. 2002, 46 U.S.C. § 1173 (1952).

according to plans and specifications approved by the FMB/Maritime Administration and the Secretary of the Navy, with particular reference to economical conversion into an auxiliary naval vessel or to other usefulness in time of national emergency;[51] repairs to subsidized vessels must be performed within the continental limits of the United States, except in an emergency;[52] and a subsidized operator must conduct his business in the most economical manner possible.[53]

Except with specific approval of the FMB or the Maritime Administration, a subsidized operator may not: (1) engage, through ownership, operation, or charter of any vessel, in the intercoastal or coastwise protected trades of the United States, either directly or through affiliates, nor hold any pecuniary interest in any person or vessel in such service;[54] (2) operate unsubsidized vessels in competition with other American-flag lines or operate any unsubsidized vessel in the subsidized service of the operator;[55] (3) own, charter, or act as agent or broker for, or operate any foreign-flag vessel competing with any essential American-flag service;[56] (4) engage directly or indirectly in any auxiliary service connected with the operation of subsidized vessels, such as stevedoring, ship repairs, ship chandlering, tow boat, or kindred services;[57] (5) effect any merger or consolidation, or directly or indirectly embark upon any new enterprise not connected with the business of shipping;[58] or (6) dispose of any interest in the subsidy agreement or make any agreement for maintenance, management, or operation of the service by others.[59]

A subsidized operator, moreover, may not include more than $25,000 for any official or employee of the company as a business expense in the computation of earnings for subsidy recapture purposes. Any salary payments in excess of $25,000 must come from the operator's retained profits, computed in accordance with the Merchant Marine Act of 1936.[60] A subsidized operator must file, upon notice from the Maritime Administration, balance sheets, profit and loss statements and other statements of financial operations, special reports, and memoranda of any facts and transactions which may affect the financial results obtained by the operator in the performance of his contract. In addition, the Maritime Administration is authorized to examine and audit the books, records, and accounts of the operator and its affiliates whenever it deems this necessary or desirable.[61]

An American operator receiving operating subsidy aid must also agree to the establishment of reserve funds to provide for replacement and acquisition of ships, prompt payment of his obligations to the United States, and continued maintenance

[51] 49 Stat. 2007, 46 U.S.C. § 1180 (1952).
[52] 49 Stat. 2004, 46 U.S.C. § 1176 (1952).
[53] *Ibid.*
[54] 49 Stat. 2012, 46 U.S.C. § 1223 (1952).
[55] 49 Stat. 2012, 46 U.S.C. § 1222 (1952).
[56] *Ibid.*
[57] 49 Stat. 2012, 46 U.S.C. § 1221 (1952).
[58] 49 Stat. 2007, 46 U.S.C. § 1178 (1952).
[59] *Ibid.*
[60] 49 Stat. 2012, 2005, 46 U.S.C. §§ 1223, 1177 (1952).
[61] 49 Stat. 2011, 46 U.S.C. § 1211 (1952).

and operation of subsidized vessels.[62] He must use articles, materials, and supplies produced in the United States, so far as practicable.[63] No operating-differential subsidy may be paid for the operation of a vessel that is more than twenty years of age, except by special order of the FMB based on a finding of "public interest."[64] The Board is authorized under section 301 of the Merchant Marine Act of 1936 to adopt minimum manning scales, minimum wage scales, and minimum working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy;[65] and these provisions are incorporated into the subsidy contracts. In addition, section 302 of the Act provides that all officers of American-flag vessels must be American citizens, and that upon each departure from the United States of a cargo vessel in respect of which a construction or operating subsidy has been granted, all of the crew ("crew" including all employees of the ships) shall be citizens of the United States.[66] Passenger vessels in respect of which a construction or operating subsidy has been granted must have a ninety per cent American-citizen crew, and the alien crewmen allowed, who may be employed only in the steward's department on the ship, must have evidence of legal admission to the United States for permanent residence.

A. Recapture

Section 606 of the Merchant Marine Act of 1936 provides that at the end of any ten-year period during which an operating-differential subsidy has been paid, if the net profit of the contractor on his subsidized vessels and services incident thereto during such period of time has averaged more than ten per cent per annum upon the contractor's capital investment necessarily employed in the operation of the subsidized vessels, the contractor shall pay to the United States an amount equal to one-half of such profits in excess of ten per cent per annum as partial or complete reimbursement for operating-differential subsidy payments during such recapture period.[67] The amount of excess profit recaptured cannot in any case, however, exceed the amount of the operating-differential subsidy payments. As of December 31, 1957, the most recent date for which reliable figures are available, it is estimated that the total recapture liability of the subsidized operators was approximately nineteen per cent of the total operating-differential subsidy accrued.

No operating subsidy may be paid for the operation of a ship on a voyage on which it engages in coastwise or intercoastal trade. However, a subsidy may be paid in reduced amounts on certain voyages in foreign trade on which a ship carries cargo or passengers in intercoastal trade or to or from an island posession or island territory of the United States.[68]

[62] 49 Stat. 2005, 46 U.S.C. § 1177 (1952).
[63] 49 Stat. 2004, 46 U.S.C. § 1176 (1952).
[64] 49 Stat. 2003, 46 U.S.C. § 1175 (1952).
[65] 49 Stat. 1992, 46 U.S.C. § 1131 (1952).
[66] 49 Stat. 1992, 46 U.S.C. § 1132 (1952).
[67] 49 Stat. 2004, 46 U.S.C. § 1176 (1952).
[68] 49 Stat. 2003, 46 U.S.C. § 1175 (1952).

Operating-differential contracts stipulate the minimum and maximum number of voyages to be made by the subsidized operators in each of the designated routes and services covered by the contract. All sailings are made on the basis of sailing schedules (including type and number of vessels, dates, ports of call, and other particulars) approved by the Maritime Administration. Sailings in excess of the maximum number specified can be made only with the prior approval of the Maritime Administration, and no subsidy is paid for such voyages. Failure of an operator to make a voyage is not deemed a breach of the operator's obligations under the contract if the cause of such failure is not within the control of the operator.

B. Capital Reserve Fund

Section 607 of the Merchant Marine Act of 1936 requires each American operator receiving operating-differential subsidy aid to establish a capital reserve fund and a special reserve fund and to make certain deposits therein.[69] In his capital reserve fund, the operator must deposit: (1) amounts equal to the depreciation (on a twenty-year life basis, or longer period in the case of certain reconstructed or reconditioned vessels), if earned, on all ships receiving an operating subsidy; (2) the proceeds of insurance and indemnities received on account of total loss of any ship receiving operating-differential subsidy aid and the proceeds from the sale or other disposition of any such ship; (3) such other amounts as the Maritime Administrator may determine to be necessary for replacement of subsidized vessels, but only if net profits on the subsidized vessels exceed ten per cent per annum of the capital necessarily employed on a cumulative basis from the date of the operating-subsidy contract; (4) interest or other income received on securities held in the capital reserve fund and the special reserve fund; and (5) interest paid on cash balances (including time deposits) in the capital reserve fund.

The capital reserve fund may only be used for the purchase of replacement ships or additional ships to be used on an essential foreign trade route, the reconstruction of ships, or for the liquidation of an indebtedness covered by notes secured by a mortgage on a subsidized ship. Temporary permission may be granted an operator to transfer to his general funds from the capital reserve fund those sums not needed to meet mortgage obligations, if the operator's general funds have become seriously depleted by reason of operating losses on ships receiving operating subsidy aid and if the funds in the operator's special reserve fund have become exhausted. If such a transfer is permitted, the operator is required to repay such transferred sums to the capital reserve fund as soon as his financial condition permits.

C. Special Reserve Fund

In his special reserve fund, the operator must deposit annually any profits (without regard to capital gains and losses) earned in the subsidized operations in excess of ten per cent, after taxes, of the operator's capital necessarily employed in the business. The profits available for deposit in the special reserve fund would be re-

[69] 49 Stat. 2005, 46 U.S.C. § 1177 (1952).

duced by the amount, if any, of profits required to be deposited in the capital reserve fund. Interest earned on cash balances in the special reserve fund must be deposited in that fund. From the special reserve fund, the operator may make only the following disbursements: (1) reimbursements of the operator's general funds for losses incurred in the operation of subsidized vessels and services; (2) payments due the United States for recapture of operating-differential subsidies, provided that the fund is not reduced below five per cent of capital necessarily employed; (3) transfers, with approval, of amounts to the operator's capital reserve fund; and (4) withdrawals, with approval, of amounts to the operator's general funds or for distribution, provided that recapture obligations to the Government are satisfied and that the special reserve fund is not reduced below five per cent of capital necessarily employed.

With the approval of the Maritime Administrator, an operator may make voluntary deposits in his capital or special reserve fund of any earnings otherwise available for distribution to stockholders. The Maritime Administration has adopted a policy limiting such voluntary deposits to amounts reasonably necessary to build up the funds in anticipation of future requirements for ship replacements. Ship-building costs, estimated amount of construction subsidy which will be payable, imminence of the replacement, and current status of the funds are all considered in determining whether a proposed voluntary deposit is reasonably necessary to provide funds for ship replacement.

Section 607 of the Merchant Marine Act of 1936 further provides that earnings deposited in operators' capital or special reserve funds, except earnings withdrawn from the special reserve funds and paid into the operator's general funds or distributed as dividends or bonuses, "shall be exempt from all Federal taxes." However, closing agreements of July 21, 1947 between the Commissioner of Internal Revenue and the subsidized operators have modified that exemption. Under these agreements, earnings from subsidized and nonsubsidized operations, as well as capital gains, are treated, to the extent deposited in reserve funds, as "tax deferred." The term "tax deferment" as used in the closing agreements means (a) that earnings deposited are not taxed in the year of deposit; (b) that such nontaxed earnings, when used in the acquisition of vessels, are not included in the tax basis of vessels either for purpose of tax depreciation or for determining gain or loss, and are not included in invested capital; and (c) that if amounts are withdrawn from the reserve funds and are paid into the operator's general funds or distributed as dividends or bonuses, the earnings withdrawn are taxable as if earned in the year of such withdrawal.

Section 604 of the Merchant Marine Act of 1936 authorizes the FMB, after consultation with the Secretary of State, to grant such additional subsidy as it determines to be necessary if it finds for any particular foreign trade route that the operating-differential subsidy is inadequate to offset the effect of governmental aid paid to

foreign competitors.[70] To date, no such additional countervailing subsidy assistance has been granted.

VII

AIDS FOR PRIVATE FINANCING—TITLE ELEVEN OF THE MERCHANT MARINE ACT OF 1936

Title eleven provides authority for government insurance of ship mortgages and short-term loans to finance ship construction.[71] The Maritime Administration, upon application by the mortgagor, is authorized to insure loans or mortgages securing loans if they are made to aid in financing the purchase of (including payment of loans previously made to finance) or reimbursing the mortgagor for expenditures previously made for the construction, reconstruction, or reconditioning of vessels. These vessels must, however be owned by American citizens and used by them in the foreign or domestic commerce of the United States, on the Great Lakes, bays, sounds, harbors, or inland lakes of the United States, or in the fishing trade or industry. The term "vessel" is defined to include all types of passenger, cargo, and combination passenger-cargo vessels, tankers, tugs, towboats, barges, and dredges documented under the laws of the United States, and fishing vessels owned by American citizens. The Maritime Administration may also make commitments to insure mortgages or loans eligible for title eleven insurance.

The faith of the United States is pledged to the payment of interest on and the unpaid balance of each mortgage and loan insured under title eleven. In the event of a default under the loan or mortgage which is not remedied within thirty days, the lender or mortgagee has the right to tender to the Maritime Administration an assignment of the mortgage or loan and the obligations connected therewith, and to demand payment of the insurance. Within thirty days from the date of any such demand, the Maritime Administration is required to accept the assignment and promptly pay the full loan or mortgage insurance in cash; the Maritime Administration then succeeds to the rights of the lender or mortgagee. Prior to 1958, prompt payment depended upon the amount of moneys held in the Federal Ship Mortgage Insurance Fund created by title eleven and upon congressional appropriations. The Eighty-fifth Congress, however, amended title eleven to authorize borrowing funds from the Secretary of the Treasury for payment of title eleven insurance if the moneys in the Federal Ship Mortgage Insurance Fund are not sufficient.[72]

A mortgage or a loan insured under title eleven must have a mortgagee or lender approved by the Maritime Administration and a mortgagor or borrower approved as possessing the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the vessel. In addition, the property or project with respect to which the mortgage or loan is to be executed must be found to be economically sound.

[70] 49 Stat. 2003, 46 U.S.C. § 1174 (1952).
[71] 52 Stat. 968 (1938), 46 U.S.C. §§ 1271-79 (1952).
[72] 72 Stat. 358, 46 U.S.C.A. § 1275(b) (Supp. 1958).

Prior to 1956, the Maritime Administration could only insure ninety per cent of the unpaid principal of loans or advances made to finance the construction, reconstruction, or reconditioning of vessels. The Eighty-fourth Congress, however, amended title eleven to provide 100 per cent government insurance of principal and interest for qualified ship mortgages and loans.[73] This amendment has greatly facilitated private financing of merchant vessel construction and has enabled the Government to follow a general policy of insuring under title eleven, rather than financing through government loans, the subsidized operator's vessel replacement costs. As of January 1, 1959, insurance was in effect on thirty-two new vessels and major reconstruction projects, with a total mortgage coverage of over $244,000,000.

Except for mortgage insurance on the construction of certain vessels which are not being built with construction-subsidy aid and which possess national defense features making them eligible for an 87.5 per cent loan under section 509 of the Merchant Marine Act of 1936,[74] in which case an eligible mortgage may cover 87.5 per cent of "actual cost," a loan or mortgage to be eligible for title eleven insurance may not exceed seventy-five per cent of the actual cost (as determined by the Maritime Administration) of the vessel construction, reconstruction, or reconditioning. The period of an insured loan or mortgage is limited to twenty years, which throughout the statutes is considered the "economic life" of ships. The annual interest charge may not exceed five per cent, or six per cent if the Maritime Administrator finds that in certain areas or under special circumstances the mortgage or lending market demands it.

In general, title eleven is not available for insuring mortgages which refinance, wholly or partly, existing mortgage indebtedness. However, the Maritime Administration may insure an eligible mortgage which refunds a previous title eleven mortgage at a lower interest rate; and it may, in certain instances and to a limited extent, insure refinancing in connection with mortgages additionally covering new construction, reconditioning, or reconstruction. The Maritime Administration is authorized to charge and collect amounts aggregating not more than one-half of one per cent of the original principal amount of the mortgage or loan to be insured; this sum is for the investigation of applications for insurance, the issuance of commitments, and the appraisal and inspection of vessels. The Maritime Administration also collects a premium for the insurance of mortgage and loans under title eleven. In the case of an insured mortgage, the premium must be not less than one-half of one per cent annually nor more than one per cent annually of the average principal amount of the mortgage outstanding; in the case of insured loans, the premium must be not less than one-quarter of one per cent annually nor more than one-half of one per cent annually of the average principal amount of the loan outstanding. All moneys received under any of the provisions of title eleven must be deposited in the Federal Ship Mortgage Insurance Fund.

[73] 70 Stat. 1087 (1956), 46 U.S.C.A. § 1271 (Supp. 1958).
[74] 49 Stat. 2000, 46 U.S.C. § 1159 (1952).

VIII

OTHER GOVERNMENT AIDS TO SHIPPING

A. Charter

In addition to the chartering of reserve fleet vessels discussed previously, section 714 of the Merchant Marine Act of 1936 provides that if the Maritime Administration finds that any essential trade route cannot be successfully developed and maintained with modern vessels under private operation by an American citizen with American-flag vessels without government financial aid other than that authorized under titles five and six of the Act, the Administration is authorized to have constructed, in private shipyards or in navy yards, the vessel or vessels of types deemed necessary for such trade route, and to bareboat charter such new vessel or vessels to the American-flag operator established on such trade route.[75] This authority has not been exercised recently. The charters under this section may contain an option to the charterer to purchase the vessel within five years of its delivery to him, upon terms generally similar to those provided in title five. Section 705 of the Act authorizes the bareboat charter of certain Government-owned vessels to American citizens who agree to operate them on a designated trade route.[76] Awards under section 705 may be made only after advertisement and competitive bidding.

Section 707 of the Merchant Marine Act of 1936 authorizes the FMB to grant an operating-differential subsidy on vessels chartered from the Government upon the same terms and conditions and subject to the same limitations and restrictions, where applicable, as apply with respect to privately-owned vessels.[77] As of January 1, 1959, only nineteen of the 312 vessels operating under subsidy contracts were Government-owned; the rest were owned by the operator. It should be pointed out, also, that most of these vessels have been traded in to the Government in connection with the operator's replacement program and are only being temporarily operated by their former owners under a use-agreement provision of the trade-in contract under section 510 of the Act.[78] Also among the nineteen are some experimental vessels chartered from the the Government.

B. Experimental Vessels

The construction, outfitting, and preparation for operation—including training of qualified personnel—of a nuclear-powered merchant ship capable of providing shipping services on routes essential for maintaining the flow of foreign commerce of the United States is authorized by section 716 of the Merchant Marine Act of 1936, as amended,[79] and the vessel is presently under construction. Section 715 of the Act authorizes the Maritime Administration, for the purpose of practical development, trial, and testing, to operate, under general agency agreements or bareboat charter,

[75] 49 Stat. 2011, 46 U.S.C. § 1204 (1952).
[76] 49 Stat. 2009, 46 U.S.C. § 1195 (1952).
[77] 49 Stat. 2009, 46 U.S.C. § 1197 (1952).
[78] 53 Stat. 1183 (1939), 46 U.S.C. § 1160 (1952).
[79] 70 Stat. 731 (1956), 46 U.S.C. § 1206 (Supp. V, 1958).

vessels which have been constructed, reconditioned, or remodeled for experimental or testing purposes.[80] Such operation can be in the foreign or domestic commerce of the United States or for the account of any agency or department of the United States.

C. War Risk Insurance

Title twelve of the Merchant Marine Act of 1936, as amended, the "Marine War Risk Insurance Act," is standby legislation which authorizes the Maritime Administration, with the approval of the President, to provide war risk and certain marine and liability insurance for protection of vessels, cargoes, and crews and personal effects when commercial insurance cannot be obtained on reasonable terms and conditions.[81] Arrangements have been made to have war risk insurance immediately available and in operation, and a full wartime insurance program can quickly be put into effect in case of need. Title twelve, by its terms, is to expire on September 7, 1965.

D. Cargo Preference for American Vessels

Section 901 of the Merchant Marine Act of 1936, provides that officers and employees of the United States traveling on official business overseas, or to or from any of the possessions of the United States, shall travel and transport their personal effects on ships registered under the laws of the United States where such ships are available and unless the necessity of their mission requires the use of a ship under a foreign flag.[82]

Section 901 also provides that whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least fifty per cent of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers) which may be transported on ocean vessels shall be transported on privately-owned American-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates, in such manner as will insure a fair and reasonable participation of American-flag commercial vessels in such cargoes by geographic areas. This fifty-fifty cargo preference may be temporarily waived, however, whenever Congress or the President or the Secretary of Defense declares that an emergency exists justifying such waiver and notifies the appropriate agency or agencies. The large amounts of cargo moved under the mutual aid laws have made cargo preference a very important factor in

[80] 70 Stat. 531 (1956), 46 U.S.C. § 1205 (Supp. V, 1958).

[81] 64 Stat. 773 (1950), 46 U.S.C. §§ 1281-94 (1952).

[82] 49 Stat. 2015, as amended, 70 Stat. 187 (1956), 46 U.S.C. § 1241 (Supp. V, 1958). For a more extended discussion of cargo preference policies and practices, see Olson, *Cargo Preference and the American Merchant Marine*, *infra* pp. 82-105.

support of American-flag tramp shipping. Section 901(b) specifically provides that it is in addition to Public Resolution 17 of the Seventy-third Congress,[83] which generally requires exclusive carriage in American vessels of agricultural or other exports financed by loans from government instrumentalities, unless the Maritime Administration certifies that American vessels are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedule, or at reasonable rates.

E. Training

The Maritime Administration is authorized to establish and maintain the United States Maritime Service as a voluntary organization for the training of American citizens to serve as licensed and unlicensed personnel on American merchant vessels; and under section 216 of the Merchant Marine Act of 1936, as amended, the Administration also maintains the United States Merchant Marine Academy located at Kings Point, Long Island, New York.[84] This institution is fully-accredited and offers a four-year course leading to a license as an officer in the United States Merchant Marine, a commission as ensign in the United States Naval Reserve, and a Bachelor of Science degree. The Eighty-fifth Congress codified the laws providing for federal assistance in the form of financial aid, vessel loans, and detail of certain federal officers, to state and territorial maritime academies or colleges for the training of merchant marine officers.[85]

F. Other Governmental Activities

A number of other government agencies in addition to the Maritime Administration and the FMB have duties in connection with the merchant marine. The United States Coast Guard, for instance, investigates all marine casualties and surveys American-flag ships for the purpose of determining whether they are seaworthy and conform to safety-of-life-at-sea requirements.[86] The Public Health Service of the Department of Health, Education, and Welfare regulates sanitary conditions on ships.[87] The Customs Office of the Treasury Department administers the documentation and registration of American-flag vessels, as well as collecting taxes and duties on cargo.[88]

IX

CONCLUSION

The need for a strong American merchant marine to aid in developing United States domestic and foreign commerce and as an arm of our national defense is as urgent today as at any time in our history.

Some of the benefits from the commercial viewpoint of our merchant marine policies derive from the fact that only the American-flag carriers have any ties inducing

[83] 48 Stat. 500 (1934), 15 U.S.C. § 616a (1952).

[84] 52 Stat. 965 (1938), as amended, 70 Stat. 25 (1956), 46 U.S.C. § 1126 (Supp. V, 1958).

[85] 72 Stat. 622 (1958), 46 U.S.C.A. § 1381 (Supp. 1958).

[86] 60 Stat. 1097 (1946), 46 U.S.C. § 660a (1952).

[87] 32 Stat. 712 (1902), 46 U.S.C. § 654 (1952).

[88] 34 Stat. 136 (1906), 46 U.S.C. § 260 (1952).

them to promote and develop America's foreign trade. Foreign-flag carriers serve our trade to suit their economic convenience, because it is profitable—sometimes to get dollar exchange, sometimes for other reasons; their reasons are those of self-interest and are only indirectly concerned with our economic welfare. As a consequence, their ships enter and withdraw from our trade at will. For example, various lines which operated foreign-flag chartered ships discontinued services when the charter market rose to abnormal heights, while some foreign-flag-owned ships which had been operated as liners over our routes were withdrawn and transferred to the more profitable world tramp market. Of course, in times of war or economic crisis, this withdrawal of foreign flag tonnage is greatly accentuated. Inflated costs may be another factor tending to this result. Without America's sound maritime policy, this could leave important segments of our industry without means of transporting products to overseas markets or obtaining vital raw materials. American foreign commerce and the American shipper are protected by the regular service with modern vessels required by operating-differential subsidy contracts. Established on specific essential trade routes, the American-flag operators tailor their operations, equipment, and service to the needs of their trade, insuring a continued flow of our vital import and export commerce.

The need for a strong American merchant marine from the viewpoint of national defense was recently stated by the Secretary of the Navy. He said:[89]

> A large, modern, and well-balanced American merchant marine is positively vital to our defense planning, as, without it, in time of war, neither the military effort nor the war economy of our Nation could be supported. The need for the development and maintenance of an adequate merchant marine was envisioned and expressed by a farsighted Congress 21 years ago. This need, from our point of view, is even more vital today.
>
> All of us are familiar with the life-sustaining role played by our merchant marine in World War II, a large-scale example of conventional warfare. Few could doubt its importance in any future warfare of a similar nature, but a number have questioned its importance in the event of a nuclear war.
>
> Should a nuclear war be forced upon us, the military envisions that there would be an initial rapid and devastating exchange of weapons, during which period safety of shipping would be paramount. Shipping would be dispersed, and no attempts made to deliver other than truly vital cargo to any major ports. In the wake of widespread nuclear destruction, the American merchant marine would assume a vital role in the hauling of the sinews of war and sustenance. This concept is not confined to our Department of Defense; it is internationally endorsed.

The FMB and the Maritime Administration keep under constant review all aspects of the situation of our American merchant marine and the factors affecting it, and endeavor by every means to achieve the objectives of the national shipping policy declaration, as set forth in title one of the Merchant Marine Act of 1936.

[89] *Hearings Before the House Committee on Merchant Marine and Fisheries, on Study of Vessel Transfer, Trade-in, and Reserve Fleet Policies*, 85th Cong., 1st Sess. 630-31 (1957).

CARGO PREFERENCE AND THE AMERICAN MERCHANT MARINE*

Thomas F. Olson†

Introduction

After World War II, it became clear that[1]

> . . . without some form of assurance of participation by United States-flag vessels in the transportation of relief and aid cargoes . . . the shipping of the recipient and other maritime nations with lower operating costs would be able to underbid American-flag vessels and eventually transport much, if not all, of these cargoes to the irreparable detriment of the American merchant marine.

Indeed, from 1948 to 1954, ". . . foreign ships . . . handled about sixty-five per cent of United States aid cargoes."[2]

For the American merchant fleet, these cargoes have aggregated almost half of their dry cargo export carryings since 1948. Without important government help, ". . . our tramp fleet would be driven from the seas almost immediately."[3]

Apart from the old age[4] and nonavailability of certain types of ships,[5] inability to meet foreign competitors' costs is the major reason why American-flag vessels are unable to compete.[6]

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[1] House Comm. on Merchant Marine and Fisheries, *Administration of Cargo Preference Act*, H.R. Rep. No. 80, 84th Cong., 1st Sess. 3 (1955) [hereinafter cited as H.R. Rep. No. 80].

[2] *Hearings on S. 2584 Before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 59 (1956) [hereinafter cited as *1956 Senate Hearings*].

Three other congressional committee hearings are repeatedly referred to in this article and will be cited as indicated: (a) *Hearings on S. 3233 Before the Subcommittee on Water Transportation of the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. (1954) [hereinafter cited as *1954 Senate Hearings*]; (b) *Hearings on S. 3233 Before the House Committee on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. (1954) [hereinafter cited as *1954 House Hearings*]; (c) *Hearings on Administration of Cargo Preference Act (50-50 Law) Before the House Committee on Merchant Marine and Fisheries*, 84th Cong., 1st Sess. (1955) [hereinafter cited as 1955 *Admin. Hearings*].

For a general discussion of United States foreign aid and development programs, see Morray, *Aid Without Tears: Opportunism in Foreign Development Policy*, 46 Calif. L. Rev. 665 (1958).

[3] *1956 Senate Hearings* 131.

[4] The bulk of American-flag vessels is over ten years old. "Only about 16 per cent of our dry cargo fleet, which numbers 722 ships of 7.3 million deadweight tons, was built after the war." Shipping Outlook, March 1958, p. 4.

[5] Only 12% of vessels equipped for refrigeration fly the American flag. FMB & Maritime Administration Ann. Rep. 60 (1957).

[6] In 1957, total monthly vessel operating expenses of American-flag ships (not including depreciation) was estimated at $39,758, while Liberian-flag vessels had costs of about $19,325. *Hearings on Study of Vessel Transfer, Trade-in, and Reserve Fleet Policies Before the House Committee on*

With increasing foreign competition, our ships have carried a declining share of increasing cargo volume. In 1956, all U.S.-flag ships—in both liner and tramp service—carried only 21 per cent of total commercial dry cargo tonnage. This compares with 41 per cent in 1951.[7]

I

CARGO-PREFERENCE LEGISLATION: PAST AND PRESENT

For over fifty years, Congress has given preferences to American-flag vessels in carrying government cargoes. In 1904, it was provided that ocean transportation of Army and Navy ". . . coal, provisions, fodder, or supplies . . ." should be on American-flag vessels.[8] This principle has been extended to federal officer and employee travel, and to transportation of personal effects[9] and automobiles.[10]

In the early years after 1904, there were few government cargoes to prefer,[11] but in 1934, the Government sought to encourage agricultural exports by foreign loans. Congress then declared its intent that the products involved[12]

> . . . shall be carried exclusively in vessels of the United States, unless . . . the United States Maritime Commission, after investigation, shall certify . . . that vessels of the United States are not available. . . .

Every basic shipping act since 1920 has stated the principle that the American merchant marine should carry a substantial portion of the United States foreign

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Merchant Marine and Fisheries, 85th Cong., 1st Sess. 142 (1957). Much of the higher American figure is wages. House Comm. on Merchant Marine and Fisheries, *Amending the Merchant Marine Act, 1936, to Provide Permanent Legislation for the Transportation of a Substantial Portion of Waterborne Cargoes in United States Flag Vessels*, H.R. REP. No. 2329, 83d Cong., 2d Sess. 1 (1954) [hereinafter cited as H.R. REP. No. 2329]. For comparative average monthly wages of American and foreign able bodied seamen in 1951, see *1955 Admin. Hearings* 160. American-flag, Liberty-type vessels averaged about $780 in daily wage costs in 1954. *Id.* at 96. Thus, a 1954 freight rate on an American vessel out of Baltimore for Korea was $15.97 per ton, while foreign-flag vessels offered the same service at $10.75. *1954 House Hearings* 66; *1955 Admin. Hearings* 82.

[7] Shipping Outlook, March 1958, p. 5.

[8] 33 Stat. 518 (1904), 10 U.S.C. § 2631 (Supp. V, 1958). A bitter experience of the Spanish-American War, when we relied on foreign colliers to fuel our Navy, is said to have resulted in the 1904 congressional mandate. *1956 Senate Hearings* 111. *Cf.* H.R. REP. No. 80, at 3: ". . . including officers or employees of the United States. . . ."

[9] 49 Stat. 2015 (1936), 46 U.S.C. § 1241(a) (1952).

[10] 70 Stat. 187 (1956), 46 U.S.C. § 1241(c), 10 U.S.C. §§ 4748, 6157, 9748 (Supp. V, 1958) (Army, Navy, and Air Force, respectively); 47 Stat. 405 (1932), 5 U.S.C. § 73c (1952) prohibits transportation of civilian employees' automobiles at government expense.

[11] In 1914, War and Navy Department interest in ocean transportation, other than for supplies, was mainly concerned with navigation obstruction and harbor line regulation, port collector co-operation, vessel inspection, and neutrality enforcement. Heubner, *Extent of Regulation of Ocean and Inland Water Transportation by the Federal Government*, 55 ANNALS 17, 23 (1914).

[12] 48 Stat. 500 (1934), 15 U.S.C. § 616(a) (1952). Originally the RFC administered these loans, but since its liquidation, see *1954 Senate Hearings* 34, the requirement affects primarily the Export-Import Bank of Washington. See 12 C.F.R. § 402.3(a) (Supp. 1958). In 1958 ". . . a number of waivers were authorized." FMB & MARITIME ADMINISTRATION ANN. REP. 8 (1958). "Public Resolution 17 [48 Stat. 500 (1934), 15 U.S.C. § 616(a) (1952)] has been of substantial assistance to this Government and to the American merchant marine in the elimination of discriminatory practices engaged in by certain foreign governments against our American-flag shipping." Statement of Mr. Francis T. Greene, Executive Vice-President, American Merchant Marine Institute, *1954 Senate Hearings* 101.

trade.[13] The goal has frequently been interpreted to mean fifty per cent,[14] and since 1948, at least ten foreign aid statutes[15] provide for cargo preference in these terms.[16] When to the 8,000,000 gross tons shipped in 1949-54[17] under the Mutual Defense Assistance Act of 1949,[18] Congress added appropriations of $7,000,000,000 for the export of surplus agricultural commodities under the Agricultural Trade Development and Assistance Act of 1954,[19] it can be seen that cargo preference is of vital importance to the entire American shipping industry and is even a matter of life or death to some of its segments.[20]

In spite of these impressive statutory provisions, however, important areas developed to which the requirement did not apply: stockpile materials,[21] offshore procurement,[22] surplus agricultural commodities,[23] guaranties by the United States Government of the convertibility of foreign currency,[24] and the ". . . procedures by which a high percentage of exports . . . and offshore purchases . . . by the United States, have been routed in foreign vessels. . . ."[25] To require the application of fifty-fifty requirements to these areas, as well as to make cargo-preference provisions permanent rather than being tied to individual foreign aid bills,[26] Congress enacted the Cargo Preference Act of 1954.[27]

[13] The Merchant Marine Act of 1920 said "greater portion." 41 Stat. 988, 46 U.S.C. § 861 (1952).

[14] *1956 Senate Hearings* 111; *1954 Senate Hearings* 96. See union criticism. *Id.* at 124.

[15] Economic Cooperation Act of 1948, 62 Stat. 137, as amended, 63 Stat. 50 (1949), 22 U.S.C. § 1501 (1952); Mutual Defense Assistance Act of 1949, 63 Stat. 714, 22 U.S.C. §§ 1571-604 (1952); Far East Economic Assistance Act of 1950, 64 Stat. 5, 22 U.S.C. § 1551 (1952); Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122, 22 U.S.C. § 1558 (1952); India Emergency Food Aid Act of 1951, 65 Stat. 70, 50 U.S.C. App. §§ 2311-16 (1952); Mutual Security Act of 1951, 65 Stat. 373, 22 U.S.C. § 1509 (1952); Pakistan Wheat Transfer Program, 67 Stat. 80 (1953); Mutual Security Act of 1954, 68 Stat. 832, 22 U.S.C. § 1750 (Supp. V, 1958); Mutual Security Appropriation, 68 Stat. 1219 (1954).

[16] Not all the statutes read alike; see administrative difficulties of the FOA in *1955 Admin. Hearings* 44.

[17] *1954 Senate Hearings* 70.

[18] 63 Stat. 714, 22 U.S.C. §§ 1571-604 (1952) and 73 Stat. 606 (1959).

[19] 68 Stat. 454, 7 U.S.C. §§ 1691-724 (Supp. V, 1958). The initial authorization of $700,000,000 was increased by 71 Stat. 345 (1957).

[20] *1956 Senate Hearings* 131.

[21] The GSA purchases strategic and critical materials abroad under the national stockpiling program of 60 Stat. 596 (1946), 50 U.S.C. § 98 (1952), and 64 Stat. 435 (1950), 50 U.S.C. § 542 (1952).

[22] Since 1950, sizable mutual defense support programs have involved purchases in one foreign nation for delivery to another. Cargo-preference requirements did not apply to this situation. *1954 House Hearings* 92, 99. See the Defense Department Directive allowing this in *1954 Senate Hearings* 68.

[23] Where the Government sold surplus agricultural commodities for foreign currencies in accordance with § 550 of the Mutual Security Act of 1951, 65 Stat. 373, 22 U.S.C. § 1509 (1952), the 50-50 provision was applied, but apparently not when the Government sold surplus grain to Spain independent from foreign aid legislation. See *1954 House Hearings* 93.

[24] See *1954 Senate Hearings* 49.

[25] Senate Comm. on Interstate and Foreign Commerce, *Permanent Cargo-Preference Legislation*, S. REP. No. 1584, 83d Cong., 2d Sess. 5 (1954) [hereinafter cited as S. REP. No. 1584]. See also *1954 Senate Hearings* 97 for Defense Department avoidance of cargo-preference requirements by postponing passage of title until delivery.

[26] For a study viewing the Cargo Preference Act as a temporary measure and urging direct solutions (*e.g.*, subsidization) to shipping industry problems, see NATIONAL PLANNING ASSOCIATION, SPECIAL SENATE COMMITTEE TO STUDY THE FOREIGN AID PROGRAM, 85TH CONG., 1ST SESS., THE FOREIGN AID PROGRAM AND THE UNITED STATES ECONOMY (No. 9) xi (Comm. Print 1957).

[27] 68 Stat. 832, 46 U.S.C. § 1241(b) (Supp. V, 1958). H.R. 1935, 86th Cong., 1st Sess. (1959) would

Every government agency, on varying grounds, opposed the bill;[28] but by 1956, most had changed position, and 1957 marked the complete capitulation of the Department of State, strongest opponent of cargo preference.[29] The Department of Agriculture, apparently unaware of the storm soon to engulf it when the surplus agricultural commodities export program[30] got underway, was in 1954 uninterested in cargo preference.[31]

On the other hand, the shipping industry, shipowners, shipbuilders, maritime unions, and the United States Chamber of Commerce unanimously supported the bill.[32] So did the domestic fertilizer industry, which felt that cargo preference would discontinue the previous foreign aid policy of purchasing large quantities of fertilizer from foreign producers.[33]

Besides government agencies, the only private organizations opposed to cargo preference were the cotton shippers. They offered lukewarm objections to the imposition of "... arbitrary methods of doing business ...," but admitted only a slight effect on them.[34]

II

CARGOES SUBJECT TO PREFERENCE

The Act applies[35]

> ... whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities. ...

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raise the American-flag requirements over 50% in certain circumstances. See discussion of this bill in note 148 *infra*.

[28] See S. REP. No. 1584 at 3.

[29] Address by Assistant Secretary Hill before Boston Propeller Club, May 22, 1957, extracted by the Committee of American Steamship Lines. Probably the Department of State was only bowing to the inevitable, for the progression of 50-50 requirements through our foreign aid legislation since 1948 would discourage most free-trade advocates. However, the reason advanced, necessary survival of the American tramp fleet, has been seriously questioned. There were no American tramps before the war. See WYTZE GORTER, UNITED STATES SHIPPING POLICY *passim* (1956); *1954 Senate Hearings* 93. Birth of the American tramp after the war has been called less than legitimate, *1954 Senate Hearings* 35; and by 1954, all but about 70 had transferred to foreign flags. *1955 Admin. Hearings* 105. There are over 40 tramps "... for which application for transfer abroad have been made with the Maritime Administration." NATIONAL PLANNING ASSOCIATION, *op. cit. supra* note 26, at 27. The crew of the American-flag tramps, all Liberty ships, averages 38 officers and men. *1955 Admin. Hearings* 151.

[30] 68 Stat. 454 (1954), 7 U.S.C. §§ 1691-724 (Supp. V, 1958).

[31] *1954 Senate Hearings* 32.

[32] S. REP. No. 1584, at 3.

[33] "[W]ithin the last 2½ years, United States produced fertilizers have made up less than 10 per cent of the total purchases ..." of foreign aid fertilizers. *1954 Senate Hearings* 3.

[34] *1954 House Hearings* 121, 122.

[35] 68 Stat. 832, 46 U.S.C. § 1241(b) (Supp. V, 1958).

While the Act "... has no application to purely commercial transactions ...,"[36] "... cargoes touched anywhere along the line by the hand of government ..."[37] may be brought within the fifty-fifty provision.

Whether the statute was intended to supersede previous legislation without specific repeal thereof is not clear. The Senate Report merely said the 1954 bill "... incorporated into permanent legislation ..." the basic policy previously proclaimed,[38] which the 1904 statute[39] affirmed.[40] However, the Department of Defense regulations[41] allow transportation in foreign bottoms when American-flag vessels are not available at fair and reasonable rates—a position which is contrary to the express provisions of the 1904 statute. Furthermore, the customary interpretation of fifty per cent[42] in the old cargo-preference statutes suggests the conclusion that the fifty-per-cent requirement is so firmly imbedded in our shipping policy, as administered, that no one thinks of 100 per cent. Thus, not only the former foreign aid fifty-per-cent cargo-preference provisions, but also the former 100-per-cent provisions may have been repealed *sub silentio*.

A. Government Supplies

The Department of Defense, the largest shipper of government supplies, categorizes its supplies into two types for purposes of cargo-preference legislation: Government-owned supplies in its possession or that of a contractor; and supplies, including those for foreign aid, contracted for but not owned by the Government at the time of shipment.[43] Supplies of the first type, when for the use of the military departments, are subject to the 100 per-cent American-flag preference, unless American-flag vessels are not available at fair and reasonable rates.[44]

Enforcement of these Defense Department regulations is provided by requiring insertion of one of three clauses in "... any contract which may involve ocean transportation. ..."[45] If the contract involves Government-owned property "... in the possession of the contractor or any of its sub-contractors (including any contract under which title to property may pass to the Government prior to shipment) ...,"[46] a clause is to be inserted in the contract "... requiring the shipment ... only as directed by the contracting officer, who shall be guided by this regulation and applicable Departmental procedures ..."[47]—*i.e.*, only by American-flag vessels in

[36] H.R. REP. No. 2329, at 2.

[37] Thorsten V. Kalijarvi, Deputy Assistant Secretary of State for Economic Affairs in *1954 Senate Hearings* 10.

[38] S. REP. No. 1584, at 1.

[39] 33 Stat. 518 (1904), 10 U.S.C. § 2631 (1952) requires transportation of Defense Department supplies solely on American-flag vessels.

[40] S. REP. No. 1584, at 2.

[41] 32 C.F.R. § 1.309 (Supp. 1958).

[42] *1954 Senate Hearings* 101.

[43] 32 C.F.R. § 1.309(b) (Supp. 1958).

[44] *Id.* § 1.309(b)(2).

[45] *Id.* § 1.309(d).

[46] *Ibid.* This is the first type discussed in text to note 43 *supra*.

[47] *Ibid.* Offshore Procurement Agreements with foreign countries have a similar provision allowing

the circumstances discussed above.[48] When the supplies are contracted for, but not Government-owned, at time of shipment (the second type described), a clause is to be inserted in the contract allowing the contractor to choose his own method of transporation, but requiring him to[49]

> . . . furnish to the Contracting Officer one copy of the applicable ocean shipping document indicating for each shipment made under this contract the name and nationality of the vessel and the measurement tonnage . . . shipped on such vessel.

These reports allow the Department of Defense, through internal reporting systems, to evaluate compliance with the cargo-preference requirements. If the need should develop ". . . for increased utilization of private American vessels, the Office of Secretary of Defense shall issue appropriate instructions to the Military Departments."[50] Upon receipt, the procuring activity is required to insert in appropriate contracts a clause providing:[51]

> . . . after the date of award of this contract, the contractor shall employ privately owned United States-flag commercial vessels, and no others, in the transportation by sea of any supplies to be furnished hereunder.

This clause may also be inserted in any contract when the head of the procuring activity determines it is ". . . necessary to assure proper implementation . . ." of the prescribed policy.[52]

Once a clause is in the contract, it affects the internal system of reports, prepared by components of the Department of Defense, of the vessel's name and flag and the tonnage shipped.[53] When American-flag vessels are ". . . not available for timely shipment at fair and reasonable rates for such vessels . . . ," the contracting officer may authorize shipment in foreign-flag vessels, or designate available American bottoms. If foreign-flag vessels are authorized, the contract price is to be equitably adjusted to reflect the difference in shipping costs.[54] If the contracting officer refuses to authorize shipment in foreign ships, but designates "available" American-flag vessels which may not be ". . . available for timely shipment at fair and reasonable

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the contracting officer to determine method of shipment. Agreement Between the United States of America and Spain, July 30, 1954, para. 2(a)(ii), [1954] 5 U.S.T. & O.I.A. 2328, T.I.A.S. No. 3094 (effective Oct. 24, 1954); Agreement Between the United States of America and the Federal Republic of Germany, April 4, 1954, para. 2(a)(ii), [1957] 8 U.S.T. & O.I.A. 497, T.I.A.S. No. 3804 (effective Feb. 7, 1957), are examples.

[48] See text to note 44 *supra*. The regulation implies the property to be shipped in American bottoms need not be the property furnished under the particular contract containing the clause. See 32 C.F.R. § 1.309(d)(1) (Supp. 1958).

[49] *Id.* § 1.309(d)(2). Apparently any shipping document indicating tonnage shipped, name, and nationality of vessel satisfies the requirement.

[50] *Id.* § 1.309(e)(2).

[51] *Id.* § 1.309(d)(2)(ii)(b).

[52] *Id.* § 1.309(d)(2)(ii)(a).

[53] *Id.* § 1.309(d)(2)(ii)(b). The reporting system seems the same as that discussed in text to note 49 *supra*, although there are minor differences in wording.

[54] Whether this rate difference is the same as allowed in similar circumstances by the commodity surplus sales agreements negotiated by the Department of State, discussed in text to note 76 *infra*, is not clear.

rates for such vessels . . . ," the contractor, in effect, suffers a loss to the extent the rates are unfair or his costs are raised by the delay. This unfortunate result clearly is not required by the Cargo Preference Act, which, by its terms, does not apply when rates are unfair.[55]

The Defense Department regulations provide that ". . . additional provisions concerning vessels to be used may be inserted in accordance with Departmental procedures."[56] Accordingly, Navy procurement directives permit additional provisions allowing the contracting officer to determine, where possible in large shipments, when and how compliance with the fifty per cent requirement is to be achieved.[57] None of these Defense Department regulations, however, applies to ". . . shipments of classified supplies where the classification prohibits the use of nongovernment vessels."[58] Furthermore, use of government vessels is encouraged to meet essential military requirements involving ". . . special transportation services which cannot be performed by the privately owned and operated merchant fleet . . ."[59]—*e.g.*, peacetime troop transport, which soon may be taken over by private American shipowners.[60]

B. Foreign Aid

> With the exception of "offshore procurement," . . . the [Act] in this respect is no more than a codification of the many previous specific clauses incorporated in foreign-aid programs starting with . . . the original Economic Cooperation Act of 1948.[61]

The Act applies where[62]

> . . . American aid is furnished "without provisions for reimbursement." This . . . would embrace . . . aid cargoes which, although technically "sold" by our Government, are, in reality, given away for a purely nominal or token sales price.

This reimbursement provision was intended "to exclude from the coverage of the bill instances where this Government acts simply as agent, on a reimbursable basis, for the foreign nation."[63]

Before the Cargo Preference Act of 1954, there were many instances[64]

[55] See discussion of unfair rates in text to note 116 *infra*. The internal report required of the Military Sea Transportation Service by 32 C.F.R. § 1.309(e)(1)(ii) (Supp. 1958) is another example of where the flexibility of the Cargo Preference Act has been ignored. The report includes in the foreign half shipments made in foreign bottoms when American-flag vessels were physically available, but unreasonably priced, although the Act would not apply in this situation. The result is a requirement of a matching American-flag shipment.

[56] *Id.* § 1.309(d)(2)(i).

[57] Navy Procurement Directive 1-307e.1.

[58] 32 C.F.R. § 1.309(c)(2)(v) (Supp. 1958). Apparently "classification" relates to security classification, not other types—*e.g.*, proprietary information of contractors.

[59] H.R. REP. No. 2329, at 3.

[60] Merchant Marine Bulletin of the American Legion, March 1958, p. 4. This would strengthen ". . . our dangerously reduced commercial liner fleet. . . ." *Ibid.*

[61] *1954 House Hearings* 92.

[62] *Ibid.*

[63] S. REP. No. 1584, at 2.

[64] *1954 House Hearings* 92.

. . . where, for example, fertilizer and other economic-aid commodities are purchased from a European country for delivery to the Far East on a "laid-down cost basis" under which American-flag ships have been effectively "frozen out" because of the lower rates quoted by low-cost foreign competitors.

The Foreign Operations Administration was frequently thought to be the main agency shipping offshore procurement cargoes in foreign bottoms. But the new Act applies whether cargoes are procured ". . . within or without the United States . . . ," and the current regulations of the International Cooperation Administration, FOA's successor, seem to prohibit the former practice.[65]

Responsibility for enforcement of the applicable fifty-fifty provisions is placed on the co-operating countries by the ICA regulations: if the fifty-fifty requirement is not met, by geographic areas,[66] for any three-month period,[67] the country concerned has to refund ICA reimbursements for commodities, insurance, and freight, ". . . as the Director in his discretion shall consider necessary to effect a compliance by the co-operating country with the foregoing requirement for that period of time."[68] Such an enforcement procedure has received congressional disapproval.[69]

Cargo-preference requirements of offshore procurement apply, of course, to government supplies as well as to foreign aid.

C. Surplus Agricultural Commodities

Agricultural exports which hit new highs during the Korean conflict fell off rapidly beginning late in 1952. Surpluses built up to alarming proportions. In Congress, emphasis centered on measures to overcome the farm surplus situation and stimulate the exportation of agricultural commodities. These measures involved the sale of price support stocks to commercial firms, donations for relief use, and the inclusion of sales for foreign currencies in the Mutual Security program. . . . In 1954, the 83d Congress continued substantial authorizations for this purpose and established an additional program of sales for foreign currencies under Title I of the Agricultural Trade Development and Assistance Act (Public Law 480).[70]

In the first five years of the program, agreements totaling $5,000,000,000 were signed with foreign countries, including over $400,000,000 for ocean freight to be paid by the Department of Agriculture.[71]

[65] 22 C.F.R. § 201.6(n) (1958). If the ICA-financed cargo were transported to a country other than the co-operating country for its use there, the regulation is not applicable by its terms. *Ibid.* Such a situation nearly occurred when surplus grain was sold to Spain for pesetas for resale to Switzerland. *1954 Senate Hearings* 100. If the grain had been transported to the repurchasing country, instead of to Spain, American-flag vessels need not have been used, according to the regulation.

[66] See discussion of geographic areas in text to note 168, *infra*.

[67] The statute itself is not strait-jacketed to short time periods.

[68] 22 C.F.R. § 201.6(n)(1) (1958). Just how a money payment to ICA can effect compliance for a time period gone past is not made clear.

[69] H.R. REP. No. 80, at 21.

[70] Maritime Research Committee, *An Analysis of the Application of P.L. 664 (50-50) to the Disposal of Agricultural Surplus under Title I of P.L. 480*, reprinted in *1956 Senate Hearings* 108.

[71] Interagency Committee on Agricultural Surplus Disposal, *Tenth Semiannual Report on Activities under Public Law 480, 83d Congress, as Amended*, H.R. Doc. No. 206, 86th Cong., 1st Sess. 37 (1959) [hereinafter cited as H.R. Doc. No. 206]. The Comptroller General has recently ruled that Commodity

Early in the program, the defeat of an attempted amendment to the original bill to provide for change of title in certain transactions at destination rather than port of origin[72] was interpreted by the Department of Agriculture as meaning ". . . the House had not intended that the 50-50 legislation should apply to section 1 of Public Law 480."[73] But the Attorney General ruled[74] that the surplus sales[75] of publicly- and privately-owned stocks under the Agricultural Trade Development and Assistance Act amounted to a "guarantee of convertibility of foreign currencies" within the meaning of the Cargo Preference Act, although there was neither a "guarantee" nor a "conversion" in the strictest meaning of the words.

The Department of State, which negotiates surplus agricultural commodity agreements with foreign countries,[76] has said the Cargo Preference Act has hampered the surplus disposal program in only a few countries.[77] On the other hand, the Department of Agriculture says the fifty-fifty provision has added at least $12,000,000 to the cost of the farm program, including $3,000,000 for rate differentials.[78] An effort

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Credit Corporation payments for ocean freight differential are limited to 50% of the gross tonnage shipped, although American-flag vessels may actually carry more. Comp. Gen. Dec. B-136530, (1959).

[72] See 100 CONG. REC. 7926-31 (1954).

[73] *1955 Admin. Hearings* 145.

[74] 41 OPS. ATT'Y GEN. No. 34 (1954).

[75] For planned uses of foreign currencies totaling $3,700,000,000 under agreements under the Agricultural Trade Development and Assistance Act signed through June 30, 1959, see H.R. Doc. No. 206, at 54.

[76] See, *e.g.*, Surplus Agricultural Commodities, Agreement Between the United States of America and Spain Under Title I of the Agricultural Trade Development and Assistance Act, Oct. 23, 1956, [1956] 8 U.S.T. & O.I.A. 3069, T.I.A.S. No. 3685 (effective Oct. 23, 1956); Agricultural Commodities Agreement Between the Government of the United States of America and the Government of the Republic of Turkey Under Title I of the Agricultural Trade Development and Assistance Act, As Amended, Nov. 12, 1956, [1956] 7 U.S.T. & O.I.A. 3187, T.I.A.S. No. 3697 (effective Nov. 12, 1956); Agricultural Commodities Agreement Between the United States of America and Italy Under Title I of the Agricultural Trade Development and Assistance Act, Oct. 30, 1956, [1956] 7 U.S.T. & O.I.A. 3219, T.I.A.S. No. 3702 (effective Oct. 30, 1956); Surplus Agricultural Commodities Agreement Between the United States of America and the Polish People's Republic, June 7, 1957, [1957] 8 U.S.T. & O.I.A. 799, T.I.A.S. No. 3839 (effective June 7, 1957); Agricultural Commodities Agreement Between the Government of the United States of America and the Government of Finland Under Title I of the Agricultural Trade Development and Assistance Act, May 10, 1957, [1957] 8 U.S.T. & O.I.A. 715, T.I.A.S. No. 3826 (effective May 10, 1957). See also Agreement Between the United States of America and Austria on Emergency Relief for Hungarians in Austria, May 10, 1957, [1957] 8 U.S.T. & O.I.A. 709, T.I.A.S. No. 3825 (effective May 10, 1957). *Cf.* note 78 *infra*.

[77] *1956 Senate Hearings* 16. The countries are the United Kingdom, Norway, Sweden, and Denmark, which carried 8, 12, 3, and 1%, respectively, of total United States foreign trade (excluding military) in 1953 and 1954. *Id.* at 17. These nations refuse to negotiate title I agreements avowedly because of the 50-50 provision, which, the Department of Agriculture estimates, has cut export agreements by up to $100,000,000 worth of farm products. *Id.* at 75.

[78] If the country has a weak currency and no merchant fleet of any size, transportation, whether in American or foreign bottoms, is paid in dollars by the United States. The importing country reimburses in its currency, but only up to the cost of foreign-flag vessels. The difference is the "rate differential." See 7 C.F.R. §§ 11.4(d)(10) and 11.12(b) (Supp. 1958); *1955 Admin. Hearings* 12. Transportation on importing country-flag vessels is not financed by the United States. 7 C.F.R. § 11.12(c) (Supp. 1958). The United States may relieve itself of this cost or the recipient nation may be relieved of a dollar drain by sale to it of ships from the reserve fleet. *Hearings Before the Senate Committee on Interstate and Foreign Commerce on Sale of Ships From Reserve Fleet*, 85th Cong., 1st Sess. 361, 368 (1957).

Of the Surplus Agricultural Commodity Agreements cited in note 76 *supra*, those with Spain and

to exempt transactions under the Agricultural Trade Development and Assistance Act from cargo-preference requirements was made in 1956;[79] hearings were held by the Senate Merchant Marine and Fisheries Subcommittee,[80] but the bill was never reported out.

Seemingly, the few ways to avoid the Cargo Preference Act in transactions under the Agricultural Trade Development and Assistance Act require considerable effort. One method, administrative determination of exemption from cargo-preference requirements, such as the 1956 sale of surplus tobacco to England in return for new housing at American military bases there,[81] is apparently available only in extraordinary cases. In limited situations where no American-flag vessels will be available—*e.g.*, nonavailability of refrigerator ships to carry fresh meat to Scandinavia—the Department of Agriculture has indicated it will be willing to make a separate commodity transaction instead of a package deal, but not unless it is absolutely certain American bottoms will be unavailable.[82] Finally, a "switch" transaction, where a third country furnishes dollars for the purchasing country, may avoid the Cargo Preference Act.[83]

The experience of the Pacific coast apple industry illustrates the administrative rigidity that has characterized the application of the basically flexible statute. Required refrigerator tonnage off the west coast for sales to Europe was virtually nonexistent, even though there was "reefer" tonnage available on the east coast.[84] Despite these difficulties, the importance of time, and the fact that the Government suffers no loss in these sales, the Department of Agriculture persisted in applying the Cargo Preference Act on a commodity-by-commodity basis,[85] although neither the statute nor the regulations require it. Furthermore, the apple sellers could not rely on the possibility of commodity waivers, as that ". . . would be offset in shipments of some other commodity. [They] would be tied to whatever complications and delays the

Yugoslavia provide for United States absorption of the rate differential. Under the agreement with Turkey, it absorbs the total freight bill when the selling price (cargo, insurance, and freight) is lower than the domestic price. Italy is unconditionally required to pay all freight costs, but no mention is made of transportation in the agreement with Finland.

[79] S. 2584, 84th Cong., 2d Sess. (1956).

[80] *1956 Senate Hearings.*

[81] House Comm. on Merchant Marine and Fisheries, *Cargo Preference and Its Relation to the Farm Surplus Disposal Program,* H.R. REP. No. 1818, 84th Cong., 2d Sess. 6 (1956) [hereinafter cited as H.R. REP. No. 1818]; *Hearings on Operation and Administration of the Cargo Preference Act Before the House Committee on Merchant Marine and Fisheries,* 84th Cong., 2d Sess. 12 (1956). See also, Agreement Between the United States of America and the United Kingdom on Surplus Agricultural Commodities: Sale of Tobacco and Construction of Housing or Community Facilities, June 5, 1956, [1956] 7 U.S.T. & O.I.A. 1071, T.I.A.S. No. 3588 (effective June 5, 1956). A similar agreement involving dried fruit and housing in Bermuda, mainly, was recently signed, following exemption of fruits from the Cargo Preference Act of 1956. Agreement Between the United States of America and the United Kingdom on Surplus Agricultural Commodities: Sale of Fruit and Fruit Products, Feb. 3, 1958, T.I.A.S. No. 3989 (effective Feb. 3, 1958). See text to note 88 *infra.*

[82] H.R. REP. No. 1818, at 12; *Hearings on Operation and Administration of the Cargo Preference Act Before the House Committee on Merchant Marine and Fisheries,* 84th Cong., 2d Sess. 225 (1956).

[83] *Id.* at 215.

[84] *1956 Senate Hearings* 29.

[85] *Id.* at 73. The GSA does the same. *1955 Admin. Hearings* 77.

latter might encounter in negotiations between governments." The December-Christmas 1954 trade in Britain was lost that way, even though there was never any question that the waiver was in order.[86] The same situation held true for fruit generally.[87] In 1956, surplus sales of fresh fruits and fruit products were exempted from cargo-preference requirements.[88] The Senate report noted the possibility of a similar problem in animal products, but left any action to the executive branch.[89]

Contrasting with the strictness with which the Cargo Preference Act was applied to the fruit industry prior to their 1956 exemption is the Opinion of the General Counsel, Department of Agriculture, that sales of nonfat dry milk by the Department to foreign governments and agencies of the United Nations for welfare distribution to refugees in Palestine and Israel were not subject to the fifty-fifty provision.[90] The Government paid one to two cents per pound to put the milk alongside the transporting vessel in United States ports, where "title and possession" changed to the purchaser, who paid three to four cents per pound in dollars for the milk for restricted use, which was less than the cost of unrestricted milk. This, said the General Counsel, was "reimbursement," making the Cargo Preference Act inapplicable.

Regardless of the merits of cargo preference, it must be admitted this opinion departs from the tendency, even among its foes, to apply the Act where a cargo is "touched anywhere along the line by the hand of government."[91] Where it stresses governmental benefit in disposing of products at the highest price obtainable, the opinion ignores the command of the statute that it applies ". . . whenever the United States shall . . . advance funds . . . in connection with the furnishing of . . ."[92] any commodities within or without the United States. Furthermore, the opinion does not accord with the intent of the Attorney General's opinion regarding sales under the Agricultural Trade Development and Assistance Act,[93] where a seemingly more difficult argument was easily hurdled. Finally, it ignores legislative history that the reimbursement exception to the Act's coverage was intended to take care of situations where the Government only acted as "agent," rather than selling the product itself.[94]

To the same effect, however, is the announcement of the Department of Agriculture that the Cargo Preference Act is not applicable when it extends credit to American exporters, whether they purchase commodities from the Department or not, or whether the exporter's or the importer's line of credit obtains the bank obligation

[86] *1956 Senate Hearings* 29.

[87] *Id.* at 28.

[88] 70 Stat. 988, 7 U.S.C.A. §§ 1703-04 (Supp. 1958).

[89] Senate Comm. on Agriculture and Forestry, *Amendments to Public Law 480*, 83d Congress, S. REP. No. 2290, 84th Cong., 2d Sess. 2 (1956).

[90] Dep't of Agriculture, Op. Gen. Counsel No. 31 (1956).

[91] *1954 Senate Hearings* 10.

[92] 68 Stat. 832, 46 U.S.C. § 1241(b) (Supp. V, 1958).

[93] 41 OPS. ATT'Y GEN. No. 34 (1954). See text to note 74 *supra*.

[94] S. REP. No. 1584, at 2; *1954 House Hearings* 92.

which assures the Department of payment.[95] Purely commercial transactions are, of course, not touched by the fifty-fifty requirement;[96] nor, does it "affect in any way the convertibility of United States dollar investments abroad."[97]

D. Government Loans

Government loans in foreign trade are made through the Export-Import Bank of Washington to "[b]orrowers [who] may be financial institutions abroad or overseas importers who can obtain the guaranty of such an institution."[98] The Bank's regulations provide that exports fostered by United States Government loans shall be carried exclusively in American-flag vessels, unless the Maritime Administration waives the requirement.[99]

> Such waivers may be obtained . . . for up to the full amount of an export if U.S. vessels are not available and, where U.S. vessels are available, for up to one-half of the export provided such portion is carried on vessels of the importing country.[100]

Besides its own banking operations, the Export-Import Bank conducts special lending operations for other agencies. It lends for the Office of Defense Mobilization under the Defense Production Act of 1950,[101] and it performs several functions for the ICA: credits under the Mutual Security Act of 1954, emergency wheat loans, the $100,000,000 credit to the European Steel and Coal Community under the Mutual Security Act of 1951, and ICA investment guaranties (currency transfer and loss by war or confiscation).[102] As noted above,[103] the last is not covered by cargo preference,[104] nor is the Bank's insuring of consigned cotton bales against war risks and expropriation.[105] However, the ICA regulations[106] apparently subject the remaining operations to cargo preference.

95 U.S. DEP'T OF AGRICULTURE, EXPORT CREDIT PROGRAMS FOR FINANCING DOLLAR SALES OF U.S. AGRICULTURAL COMMODITIES (1957).

96 *1954 Senate Hearings* 11. The Cargo Preference Act ". . . has no application to purely commercial transactions where a broker or exporter sells to a firm abroad without the participation of the United States Government." H.R. REP. No. 2329, at 2.

97 *1954 House Hearings* 97. See generally, INTERNATIONAL COOPERATION ADMINISTRATION, INVESTMENT GUARANTY HANDBOOK (1957).

98 EXPORT-IMPORT BANK OF WASHINGTON, REPORT TO CONGRESS FOR THE PERIOD JULY-DECEMBER 1956, at 5 (1957). In June 1958, the Bank began to make loans in foreign currencies accumulating under the surplus-disposal program to American firms for foreign expansion and development and to foreign firms to expand markets abroad for American agricultural products. In the following year, the Bank acted on a foreign currency equivalent of $36,000,000. EXPORT-IMPORT BANK OF WASHINGTON, REPORT TO CONGRESS FOR 12 MONTHS ENDING JUNE 30, 1959, pt. 1, at 197 (1959). Probably the 50-50 provisions should apply to these loans too, as they will probably be viewed as further foreign aid. See *1956 Senate Hearings* 125. *Contra,* the 1951 Defense Department Directive on Mutual Defense Shipments in *1954 Senate Hearings* 67.

99 12 C.F.R. § 402.3(a) (Supp. 1958).

100 *1954 Senate Hearings* 10.

101 68 Stat. 832 (1954), 46 U.S.C. § 1241(b) (Supp. V, 1958).

102 EXPORT-IMPORT BANK OF WASHINGTON, REPORT TO CONGRESS FOR 12 MONTHS ENDING JUNE 30, 1957, pt. 2, at 96 (1957).

103 See text to note 97 *supra.*

104 See the example of investment guarantees in *1954 Senate Hearings* 49.

105 See EXPORT-IMPORT BANK OF WASHINGTON, REPORT TO CONGRESS FOR THE PERIOD JULY-DECEMBER 1957, at vi (1958).

106 ICA Reg. 1, 22 C.F.R. § 201 (Supp. 1958).

E. Miscellaneous

Even though there seems to be no regulation or policy statement on the subject, returns of Mutual Defense Assistance Act of 1949 equipment, for example from the United Kingdom,[107] would be subject to cargo preference,[108] since the United Kingdom makes delivery alongside the ship at the port of origin. Similarly, transportation to Italy of surplus Defense Department property for sale there[109] would be subject to the same requirement. The opposite result should obtain when transportation follows purchase, absent stipulations in the contract of sale.[110]

Student exchange programs for which the Government provides funds, including transportation,[111] would seem to be not subject to cargo preference.[112] Furthermore, the 1954 Act expressly exempts from its requirements cargoes carried in the three ships of the Panama Canal Company, a government corporation, which primarily serves the needs of the Panama Canal and its workers.[113]

F. Waiver

In the event of war or national emergency, Congress, the President, or the Secretary of Defense may waive the fifty-fifty requirement. The House Report indicates waiver is authorized for "... extraordinary situations. . . ."[114] The statute's drafters explained further that it did not require "... declaration of a national emergency.... The discretion to waive can be exercised immediately whenever the national interest so requires."[115] Other agencies may secure the waiver, but it is not known whether this authority has ever been exercised.

III

DETERMINATION OF NONAVAILABILITY OF AMERICAN-FLAG VESSELS

The Cargo Preference Act only applies "... to the extent United States-flag commercial vessels are available at fair and reasonable rates for [such] vessels. . . ."[116]

[107] See Agreement Between the United States of America and the United Kingdom on Mutual Defense Assistance: Disposition of Equipment and Materials, May 13, 1957, para. 3, [1957] 8 U.S.T. & O.I.A. 835, T.I.A.S. No. 3843 (effective May 13, 1957).

[108] Presumably to the 100% American-flag shipping requirement of 32 C.F.R. § 1.309(b)(2) (Supp. 1958).

[109] See Agreement Between the United States of America and the Republic of Italy on Sales in Italy of Excess Military Property, June 22, 1957, [1957] 8 U.S.T. & O.I.A. 881, T.I.A.S. No. 3850 (effective June 22, 1957).

[110] Apart from enforcement difficulties of such stipulations and general undesirability from a selling standpoint, reasoning akin to that of the Department of Agriculture, see text to note 94 *supra*, would make cargo preference inapplicable here on the ground that the Government is reimbursed.

[111] See, *e.g.*, Commission for Education Exchange, Agreement between the United States of America and Paraguay, April 4, 1957, [1957] 8 U.S.T. & O.I.A. 946, T.I.A.S. No. 3856 (effective June 26, 1957).

[112] 49 Stat. 2015 (1936), 46 U.S.C. § 1241(a) (Supp. V, 1958), applies only to government employees, while the Cargo Preference Act of 1954 covers ". . . equipment, materials, or commodities. . . ."

[113] H.R. REP. No. 2329, at 2; *1954 House Hearings* 63.

[114] *Ibid.*

[115] *1954 House Hearings* 94.

[116] 68 Stat. 832 (1954), 46 U.S.C. § 1241(b) (Supp. V, 1958).

This formula was introduced to avoid setting ceilings on rates[117] or allowing American shipowners a free hand in rate-setting. But the phrase has been the statute's most troublesome to apply.[118]

A. Responsibility for the Determination

The Secretary of Commerce pointed out during committee hearings that[119]

> ... the bill is not clear as to who is to determine, for purposes of the 50 per cent minimum participation provision, whether United States-flag commercial vessels are available and whether their rates are reasonable.

This uncertainty and a lack of coordination among agencies seeking ships has resulted in at least one debacle. In early 1955, the FOA and the Department of Agriculture were both conducting huge programs for the sale of surplus grain to Yugoslavia. Freight rates on American vessels paid by the Department of Agriculture in February 1955 were up ninety-seven per cent over rates obtainable the previous October. Meanwhile the Maritime Administration, operating without data on these programs, permitted the transfer of nearly one-half the total American-flag tramp fleet, then consisting of about 130 Liberty dry-cargo vessels, to foreign flags, thus intensifying the bottleneck.[120] The confusion resulted "... in increased costs to the Federal Treasury, as well as [restricting] the benefits which reasonably can be expected to flow from the Cargo Preference Act."[121]

At least two federal agencies have government-wide shipping responsibilities. The Federal Property and Administrative Services Act of 1949[122] established the General Services Administration and provided that the Administrator should pre-

[117] Ceilings were rejected on the ground "... it takes no great amount of foresight to realize that freight rates for United States-flag vessels would remain at the ceiling. The Government must be in a position to take advantage of the pendulum of supply and demand when it swings in its direction." H.R. REP. No. 80, at 18.

[118] *Id.* at 16.

[119] H.R. REP. No. 2329, at 2.

[120] Data from H.R. REP. No. 80, at 6, 9, 12. The following table summarizes freight rate developments:

Yugoslavia Tramp Grain Rates
United States Atlantic/Yugoslavia
(N.S.A. Rate = $15.65 per Ton)

Month	*Highest Rate Paid Per Ton* *American-Flag*	*Foreign-Flag*
July, 1954	$10.50	$ 7.50
Aug.	10.45	0
Sept.	11.00	0
Oct.	12.10	9.00
Nov.	12.75	10.50
Dec.	14.00	11.75
Jan., 1955	15.15	0

Data from *1955 Admin. Hearings* 50. For the subsequent rate instability during and after the "Suez Crisis," see Note, *The American Shipping Industry and the Conference System*, 11 STAN. L. REV. 136, 140 n. 21 (1958).

[121] H.R. REP. No. 80, at 17.

[122] 63 Stat. 377, 40 U.S.C. §§ 471-514 (1952).

scribe policies and methods of procurement, including transportation and traffic management.[123] On the other hand, the Cargo Preference Act is an amendment to the Merchant Marine Act of 1936, for which the Maritime Administration has ". . . broad responsibilities. . . ."[124] In reconciling these seemingly conflicting responsibilities, the House Committee on Merchant Marine and Fisheries in 1955 recommended that the GSA centralize transportation and traffic management in one agency,[125] while the Maritime Administration should exercise general surveillance and make periodic reports to Congress covering operation of the Cargo Preference Act.[126] Thus the stage is set for a maze of different methods of determining whether an American-flag vessel is available at a fair and reasonable rate.

B. Methods of Determination

The difficulty of determining fair and reasonable rates for American-flag commercial vessels is shown by comparing the testimony of administrators who have made their ". . . own computations on the basis of cost of operation and then checked them with the Maritime Administration to determine whether or not the rates were reasonable . . ."[127] with that of the administrator who said his agency had made no ". . . determination or . . . finding as to what are fair and reasonable rates because, frankly, I don't know what a fair and reasonable rate is."[128]

[123] 63 Stat. 383, 40 U.S.C. § 481 (1952).

[124] See statement of Mr. Louis S. Rothschild, Maritime Administrator, in *1955 Admin. Hearings* 84.

[125] GSA may delegate to other agencies. 63 Stat. 390 (1949), 40 U.S.C. § 487 (1952); H.R. REP. No. 80, at 17.

[126] *Id.* at 21, 22. On the other hand, the Senate Committee on Interstate and Foreign Commerce says the Maritime Administration should set the rates. Senate Comm. on Interstate and Foreign Commerce, *Influence of Cargo Preference Statutes on the Surplus Agricultural Disposal Program.* S. REP. No. 2376, 84th Cong., 2d Sess. 17 (1956) [hereinafter cited as S. REP. No. 2376].

The Maritime Administration has indicated each agency administers the statute. H.R. REP. No. 80, at 11. ICA says the Director determines compliance. 22 C.F.R. § 201.6(n) (1958). GSA assumes responsibilities only for *its* freight movements. GSA Admin. Order No. 232, Supp. No. 1, para. 2 (1958). The Department of Agriculture approves bookings and charters in Washington (and New Orleans for cotton). 7 C.F.R. § 11.12 (Supp. 1958). The Department of Defense apparently has made compliance the responsibility of the Military Sea Transportation Service, 32 C.F.R. § 1.309(d)(1) (Supp. 1958); although the individual contracting officer may be able to determine compliance. See Naval Procurement Directive 1-307e.1.

The Maritime Administration is required to determine availability for the Export-Import Bank of Washington. 48 Stat. 500 (1934), 15 U.S.C. § 616(a) (1952); see also 12 C.F.R. § 402.3(a) (Supp. 1958). Furthermore, on request, the Maritime Administration will give an interested agency assistance in determining reasonableness of freight rates for purposes of the Cargo Preference Act. FMB & MARITIME ADMINISTRATION ANN. REP. 11 (1957).

[127] Testimony of Mr. A. J. Walsh, Commissioner, Emergency Procurement Service, GSA, quoted in H.R. REP. No. 80, at 10.

[128] Statement of Mr. Arthur G. Syran, Director, Office of Transportation, FOA, *1955 Admin. Hearings* 46. The following testimony of Mr. Syran is also instructive: "This American tramp operator should be supported and I would be unwilling to go into the foreign-flag market, say, exclusively to get vessels. . . . We haven't done that. If the vessel isn't available, that may only be a matter of a week or 10 days. . . . We would go out of our way to use an American tramp. . . . There should be competition between the American-flag operators, but he should be given the preference not only from the point of view of the statute, but as a moral obligation. . . . I don't think it is right for us to announce that we are going to use foreign-flag operators because if an American-flag operator is making a profit there is a bonanza for the foreigner. . . . This is a fantastic price of $11.75 as compared to $7.50." *Id.* at 55. Figures referred to are shown in note 120 *supra*.

The formula was adopted on the Senate floor, where a "market" rate provision was deleted in favor of the "fair and reasonable" rate, as it was thought by Senator Butler, the bill's sponsor, and others that the latter formula would be less costly to the taxpayers.[129]

However, two different interpretations of "fair and reasonable" were adopted by the agencies:[130]

> One view is that a rate may be considered unfair and unreasonable when it exceeds the going market rate. The other view is that a fair and reasonable rate is one which will return to the United States-flag operator a fair profit in addition to his operating costs.

A position similar to the latter interpretation was taken by the Comptroller General, who, supported by the Senate floor debates, declared that "fair and reasonable rates" should not mean[131]

> . . . going market rates as such for the United States-flag commercial vessels. . . . However, it seems apparent that the statute contemplates average "fair and reasonable rates," which may or may not be profitable, or even compensatory, to a high-cost operator.

The current regulations of the agencies responsible for government programs involving ocean freight subject to the Cargo Preference Act indicate this dichotomy has been all but ignored.[132] To be sure, the GSA has made computations based on cost of operation, but the recent GSA Administrative Order prescribing agency application of the Cargo Preference Act defines fair and reasonable rates as generally the rates established by operators of dry-cargo liners.[133] In 1951, the Maritime Administration, too, made determinations of "... a fair and reasonable maximum level for privately owned vessels . . . ,"[134] and its current uniform bareboat charters of Government-owned dry-cargo vessels indicate familiarity with similar computations.[135] Nevertheless, there is recent indication that fair and reasonable profits are prominently emphasized in rate calculations of the Maritime Administration.[136]

On the other hand, the Department of Agriculture has never endeavored to consider cost and profit data in making rate determinations, nor has it established

[129] 100 CONG. REC. 7784, 7796, 7808 (1954).

[130] *1955 Admin. Hearings* 178.

[131] Comp. Gen. Dec. B-95832 (1955).

[132] Indeed, a recent study concluded the reasonable rate limit is now interpreted to be ". . . rates compensatory for United States-flag shipping." NATIONAL PLANNING ASSOCIATION, *op. cit. supra* note 26, at 24.

[133] GSA Admin. Order No. 232, Supp. No. 1, para. 6g(6) (1958). There is no indication how rates are determined for tankers.

[134] *1955 Admin. Hearings* 91.

[135] See definitions of "net voyage profit," "fair and reasonable overhead expenses," and "capital necessarily employed" in clause 38 of the uinform bareboat charter, 46 C.F.R. § 221.13 (Supp. 1958). See also *id.* § 299.82. But see recent indications that reserve fleet charter rates are based on Cargo Preference Act fair-and-reasonable-rate determinations in *Hearings Before the House Committee on Merchant Marine and Fisheries on Current Merchant Marine Problems*, 85th Cong., 1st Sess. 43 (1957).

[136] *Ibid.*

a "fair and reasonable" rate.[137] Instead, information on vessel availability is collected from brokers and foreign embassies, and the Maritime Administration (National Shipping Authority) ceiling is taken as the upper limit of what is fair and reasonable.[138] The current regulations are silent on the point, but reimbursement for ocean transportation of surplus commodity export sales (when procured separately from the commodity) is limited to the prevailing rate for similar freight contracts, or in the case of dry-cargo liner shipments, to the conference rate for such service.[139]

The FOA admitted in 1956 not knowing what a "fair and reasonable" rate was; and so it took vessels at market rate, as long as not "unconscionable."[140] The current regulation may indicate a separate formula: ". . . fair and reasonable rates for such a vessel."[141] Arguably, this may require cost recovery and reasonable profit determination for each vessel, whether a high- or low-cost operation. Probably, however, the term is merely the singular of "such vessels" as used in the statute, which, in view of the FOA opinion that a vessel's books could not be gone into,[142] presumably means "market" rates to this agency also.

In exempting carriage of government or contractor goods from the 100 per cent American-flag requirement, the Defense Department formula is: ". . . unless such vessels are not available at fair and reasonable United States-flag rates."[143] This implies the fair and reasonable rates need not be commercial rates, and thus allows imposition of the National Shipping Authority government-operated rates as a ceiling,[144] if this be desired.

Except possibly for the formula of the Department of Defense, it appears that the federal agencies administering the Cargo Preference Act, despite Comptroller General and House Committee urging, are unwilling and generally unable to base rate determinations on "cost plus reasonable profit" concepts. Rather, the current regulations strongly imply almost complete dependence on market determinations, save only for a helping hand from the Maritime Administration when market rates lose all semblance of fairness and reasonableness. Thus, the current Maritime Ad-

[137] *1955 Admin. Hearings* 17.

[138] *Id.* at 18, 19. The practice continued into 1955. See *1956 Senate Hearings* 72. The NSA ceiling was established for purposes of movements in Maritime-Administration-operated vessels in 1951, but was adopted by FOA as the maximum it would pay for American-flag vessels. *1955 Admin. Hearings* 91.

The Department of Agriculture has indicated ". . . in the event that the United States-flag tramp vessel and the foreign tramp vessel rate are in excess of the Maritime ceiling neither of these tramp vessels would be approved for shipment of commodities on Title I, Public Law 480 [Agricultural Trade Development and Assistance Act] programs." *1956 Senate Hearings* 72.

[139] See 7 C.F.R. § 11.12(c)(2) (Supp. 1958).

[140] See *1955 Admin. Hearings* 46, 52.

[141] 22 C.F.R. § 201.6(n)(2) (1958).

[142] *1955 Admin. Hearings* 52.

[143] 32 C.F.R. § 1.309(b)(2) (Supp. 1958).

[144] See note 138 *supra.* The contract clause required by 32 C.F.R. § 1.309(d)(2)(ii) (Supp. 1958), discussed in text to note 52 *supra*, employs the commercial-rates test. Note also in that clause the American-flag vessels must be available for *timely* shipment; otherwise the American-flag requirement is waived. This is the only agency statement adding a timeliness requirement.

ministration rate determinations[145] are vital in programs subject to the Cargo Preference Act.[146]

C. Methods of Choosing Foreign-Flag Vessels

Indications of method of choice of foreign-flag vessels are apparently available only from the ICA. There, emphasis is placed on use of ships of foreign aid recipients, as distinguished from the vessels sailing under "flags of convenience," on the ground that the latter make no genuine contribution to the economy of the country under whose flag they fly.[147] When vessels of the country receiving aid are unavailable, however, vessels of the ". . . regular maritime countries . . ." United Kingdom, Netherlands, and Scandinavia—are mainly used.[148] On shipments in foreign-flag vessels, where freight is paid by the ICA under specified conditions,[149] choice of third-country flags must be from a listing promulgated by the ICA.[150]

IV

HOW TO COUNT TO ONE-HALF

Whether the foreign nation recipient[151] or some office in the agency itself[152] makes the decision whether a given cargo is to be carried by American-flag or foreign-flag vessel, the agency administering the export is responsible for assuring[153]

> . . . that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, . . . in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas. . . .

[145] See FMB & MARITIME ADMINISTRATION ANN. REP. 9 (1958).

[146] The ECA (predecessor of the FOA and the ICA) estimated the NSA ceiling had saved the Government $90,000,000 in freight rates from March to December 1951 in the coal and grain foreign aid programs alone. *1955 Admin. Hearings* 93.

[147] *Id.* at 62.

[148] *Ibid.* H.R. 1935, 86th Cong., 1st Sess. (1959) would require use of American-flag vessels, when available at fair and reasonable rates for American-flag vessels, in excess of the 50% requirement when vessels of the recipient nation's flag are not available at fair and reasonable rates for that nation's vessels.

[149] See note 78 *supra.*

[150] 22 C.F.R. § 201.7(a) (1958).

[151] The foreign nation basically administers the 50-50 requirement under programs of the Department of Agriculture, *1955 Admin. Hearings* 33; and the ICA. 22 C.F.R. § 201.6(n)(1) (1958). See text to note 68 *supra.*

The ICA has added the unique requirement that cargo-preference compliance is required for each fiscal quarter. 22 C.F.R. § 201.6(n)(1) (1958).

[152] While Defense Department regulations make the Commander, Military Sea Transportation Service, or in some cases the contracting officer, see Naval Procurement Directive 1-307e.1, responsible for arranging ocean transportation of government owned supplies, 32 C.F.R. § 1.309(d)(1) (Supp. 1958), shipments involving offshore procurement of foreign aid are individually regulated by the Office of the Secretary of Defense. *Id.* §§ 1.309(d)(2)(ii) and (e). ICA exports may be administered by either the GSA or the Department of Agriculture. *1955 Admin. Hearings* 47.

[153] 68 Stat. 832 (1954), 46 U.S.C. § 1241(b) (Supp. V, 1958).

A. Vessel Classification

The first classification to which the fifty-fifty provision applies is specified in the statute: vessel type. "Tramp ships [,] . . . the dry-bulk carriers described in the [Act] . . . ,"[154] are slow, irregularly-scheduled vessels which go where a prospective cargo calls. The American tramp fleet contains about seventy vessels and carries about two per cent of our commercial dry-cargo exports.[155]

Dry-cargo liners operate a ". . . regularly scheduled service on fixed routes under which rates are published and identical regardless of nationality of ship."[156] They constitute about ninety per cent of our freighter fleet,[157] and are generally faster than tramps.[158]

Each class may carry cargoes of the other, and the resulting difficulty of definition is reflected in the regulations. The Department of Agriculture has adopted[159] the Maritime Administration's definitions,[160] distinguishing tramps from liners principally by regularity of schedule; the GSA, on the other hand, differentiates by method of rate determination;[161] while the Department of Defense separates them by calling the tramp a carrier of ". . . shipload lots of homogeneous unmarked cargoes such as grain . . . ," while liners carry ". . . heterogeneous marked cargoes in parcel lots. . . ."[162]

All agencies seem to define tankers as carriers of full cargoes of a single bulk liquid commodity,[163] although both liners and tramps may also carry bulk liquids. But the Comptroller General has ruled that the recent use of tankers in carrying bulk grain cargoes does not result in their being classified as dry-bulk carriers for purposes of Cargo Preference Act computations.[164]

Government-owned vessels under bareboat charter to private operators are ineligible to receive cargoes under the American-flag half of the statute, as interpreted

[154] *1954 Senate Hearings* 82.

[155] *1956 Senate Hearings* 20. James B. Stuart, President, American Tramp Shipowners Association, has stated that while the matter of schedules is usually cited as the difference between liners and tramps, a more important difference is the matter of setting rates. Most liners operate in conferences which set the same rates for American and foreign ships, while tramps' rates are set, more or less, by supply and demand. Furthermore, tramps do not share in the operating subsidies which enable American liners to meet foreign competition. *1955 Admin. Hearings* 189.

[156] Statement of Transportation Association of America, *1956 Senate Hearings* 60. See generally Note, *The American Shipping Industry and the Conference System*, 11 STAN. L. REV. 136 (1958).

[157] *Ibid.* For an excellent discussion of the impact of foreign aid on liner or berth operators, see NATIONAL PLANNING ASSOCIATION, *op. cit. supra* note 26, at 48.

[158] See Shipping Outlook, March 1958, p. 4.

[159] 7 C.F.R. §11.12(g) (Supp. 1958).

[160] *1955 Admin. Hearings* 183.

[161] GSA Admin. Order No. 232, Supp. No. 1, para. 6g (1958).

[162] 32 C.F.R. § 1.309(a) (Supp. 1958).

[163] *1955 Admin. Hearings* 183. Until recently, the foreign aid program had little effect on tanker operations. However, the current boom in supersized tanker construction has caused the Maritime Administration to allow some foreign-flag operators to return to the American flag. Foisie, *'Too Many Tankers'—How 4 Bay Deals Shape Up*, San Francisco Chronicle, Aug. 11, 1958, p. 12, col. 1.

[164] The 50-50 computation is to be made as to the type of vessel rather than type of service performed, Comp. Gen. Dec. B-136530 (1958), or type of cargo carried, Comp. Gen. Dec. B-136530 (1959).

by the GSA,[165] while the Department of Defense includes these vessels in its definition of "private United States vessels."[166] On the other hand, ". . . 'privately owned' ships, of course, include American ships chartered by their owners to the Government."[167]

B. Geographic Area

While the statute does not require a minimum fifty per cent use of American-flag vessels in any given geographic area, the requirement of fair and reasonable American-flag participation by areas has, perhaps naturally, been interpreted to demand fifty-fifty treatment.[168]

However, the generality of the words "geographic areas" has caused considerable difficulty in administering fifty-fifty treatment, particularly in the surplus agricultural commodity disposal program,[169] where the Department of Agriculture applies the Cargo Preference Act to shipments to each country.[170] The Maritime Administration encourages this breakdown, ". . . where possible. . . ."[171] The Department of Defense essentially does the same, in as much as its eighteen areas roughly equate one country with an area.[172] To be contrasted are the interpretations of the ICA[173] and the GSA,[174] which, using identical breakdowns, segregate shipments from the United States from shipments from points outside. The latter shipments are further subdivided so that the fifty-fifty requirement applies separately for shipments from Europe and Africa; the Near East and South Asia; Latin America and Canada; and the Far East.[175] The statute's authors have indicated that such a broad

[165] GSA Admin. Order No. 232, Supp. No. 1, para. 6c (1958). The Comptroller General first took this position in 1954. *1954 Senate Hearings* 4. See also the recent Comp. Gen. Dec. B-137864 (1958).

[166] 32 C.F.R. § 1.309(a)(5) (Supp. 1958). Under the Mutual Defense Assistance Act of 1949, as interpreted by the Department of Defense, such vessels were ineligible only if manned by government personnel. See Defense Department Directive No. 2110.12 (1951), quoted in *1954 Senate Hearings* 67.

[167] Statement of American Merchant Marine Institute, Pacific-American Steamship Association, and Association of American Shipowners, in *1954 House Hearings* 91. The Department of Defense concurs if on voyage or time charter to the Government, but lists such vessels as government ships if on bareboat charter to the Government. 32 C.F.R. § 1.309(a) (Supp. 1958).

[168] In view of consistent congressional application of 50-50 treatment in the past decade, any other agency interpretation may be difficult to justify, at least as to broad rules. The congressional language, however, clearly shows an intention to avoid rigidity of application in specific cases. Apparently this has not been successful. See shipowners' comments in *1956 Senate Hearings* 130, 138. Indeed, the GSA and the Department of Agriculture apply the statute by vessel type, by area, and by commodity, apparently misconstruing the statutory language, ". . . 50 percentum of such . . . commodities . . . ." See *1955 Admin. Hearings* 77; *1956 Senate Hearings* 73.

[169] See shipowner association representatives' comments in *1956 Senate Hearings* 139.

[170] See statement of Earl L. Butz, Assistant Secretary of Agriculture, in *id.* at 73.

[171] See Maritime Administration Cargo Preference Report procedures in *1955 Admin. Hearings* 182.

[172] 32 C.F.R. §1.309(c) (Supp. 1958). However, cargo preference is not applied to Defense Department intra-area off-shore procurement. *Ibid.*

[173] 22 C.F.R. § 201.6(n)(1) (1958).

[174] GSA Admin. Order No. 232, Supp. No. 1, para. 6a(2) (1958).

[175] However, ICA determinations of nonapplicability of the Cargo Preference Act owing to nonavailability of American-flag vessels are made country-by-country, rather than by area. 22 C.F.R. § 201.6(n)(2) (1958). The ICA "may or may not" include such excluded shipments in the American-flag 50%. *Ibid.* The GSA yields to ICA regulations when the GSA arranges transportation of ICA cargoes. GSA Admin. Order No. 232, Supp. No. 1, para. 6e (1958).

definition of geographic areas beyond individual countries was the sounder interpretation.[176] Other liner and tramp shipowner spokesmen[177] and the Senate Interstate and Foreign Commerce Committee[178] concede this was intended by the statute.

Apparently only the Department of Defense has established areas exempt from the cargo-preference requirements. Basically, these are Arctic and Antarctic areas and ". . . ports and facilities under security restrictions in otherwise nonexempt areas."[179]

V

IMPACT OF TREATIES ON CARGO PREFERENCE

Several United States treaties provide: "vessels of either Party shall be accorded national treatment and most-favored-nation treatment with respect to the right to carry all cargo that may be carried by vessel to or from the territories of the other Party." In treaties taking effect (a) prior to [180] and (b) subsequent to[181] enactment of the Cargo Preference Act, the effect of this clause on the Act's administration raises a difficult problem: Are the government agencies administering the Act required to treat German-flag vessels, for example, as American-flag vessels by virtue of the national-treatment provision[182] in the German treaty? Furthermore, must Israeli-flag vessels be treated as are these German-flag vessels, by virtue of the most-favored-nation provision[183] in the Israeli treaty? No conclusive answer is available; certainly the congressional committees were not advised of the problem in the cargo-preference hearings.

When the Cargo Preference Act was passed in 1954, its operation was not affected by the presence of this clause in existing treaties.[184] Thus, unless the German

[176] *1956 Senate Hearings* 130.

[177] *Id.* at 142.

[178] S. REP. No. 2376, at 15.

[179] 32 C.F.R. § 1.309(c) (Supp. 1958). In 1955, for the first time, cargo ships penetrated the Arctic to a significant extent. National Defense Transportation Journal, Nov.-Dec. 1955, p. 30.

[180] See Treaty Between the United States of America and Israel on Friendship, Commerce and Navigation, Aug. 23, 1951, art. XIX(4), [1954] 5 U.S.T. & O.I.A. 550, T.I.A.S. No. 2948 (effective April 3, 1954). This treaty uses the word "articles" in place of "cargo."

[181] See, *e.g.*, Treaty Between the United States of America and the Federal Republic of Germany on Friendship, Commerce and Navigation, Oct. 29, 1954, art. XX(2), [1956] 7 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593 (effective July 14, 1956); Treaty Between the United States of America and Greece on Friendship, Commerce and Navigation, Oct. 13, 1954, art. XXI(5), [1954] 5 U.S.T. & O.I.A. 1829, T.I.A.S. No. 3057 (effective Oct. 13, 1954); Treaty Between the United States of America and Nicaragua on Friendship, Commerce and Navigation, Jan. 21, 1956, art. XIX(4), T.I.A.S. No. 4024 (effective May 24, 1958).

[182] . . . "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." Treaty with Germany, *supra* art. XXV.

[183] ". . . treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country." *Ibid.*

[184] "I am not here to say that the United States cannot restrict the carriage of such cargoes to its own vessels. Of course it can." Statement of Mr. Thorsten V. Kalijarvi, Deputy Assistant Secretary for Economic Affairs, Department of State, *1954 House Hearings* 45. See also 5 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 185-95 (1943). Enactment of the Cargo Preference Act probably is no

treaty applies to cargoes subject to the cargo-preference laws, no difficulty arises. Several possible reasons may be suggested why the German treaty is inapplicable.

First, the treaty itself provides it ". . . shall not preclude the application by either Party of measures . . . necessary to protect its essential security interests."[185] The Cargo Preference Act is premised on[186]

> . . . the policy of assuring to privately owned United States merchant-flag vessels that "substantial portion of the waterborne export and import foreign commerce," which the Congress has proclaimed in repeated statutes as necessary to maintenance of an adequate merchant fleet.

This necessity is based to an important degree on the role of the American merchant marine as ". . . an indispensable factor in our whole defense system."[187] To the extent this is so, the Cargo Preference Act would seem a measure excepted by the treaty as a United States step ". . . necessary to protect its essential security interests."

In the second place, the Senate committee report on the German treaty pointed out that the national and most-favored-nation treatment provisions applied to ". . . normal commercial and industrial pursuits."[188] In a sense, foreign aid and government cargoes are neither normal nor commercial. This conclusion finds support in the analogous treaty provision giving only most-favored-nation, not national, treatment with respect to awarding of government contracts.[189]

Even if the treaty did require treating German-flag vessels as American-flag vessels for purposes of the Cargo Preference Act, arguably it would be sufficient compliance to treat them as American-flag government, not private, vessels.

VI

CONCLUSION

In 1954, the German Diplomatic Mission in Washington noted[190]

> . . . that no legislation of this or a similar nature exists in the Federal Republic of Germany in the field of maritime transportation, and American shipping can unequivocally participate in traffic offered for shipment in West German ports.

If this were generally the case, the impact of the Cargo Preference Act in the larger realm of American foreign trade would be insignificant.[191] However, in 1956, Chile

violation of the Israeli treaty, in as much as art. VII, 2 provides: "Each Party reserves the right to limit the extent to which aliens may . . . carry on enterprises engaged within its territories in . . . water transport. . . ."

[185] Treaty with Germany, *supra* art. XXIV, 1(d).

[186] S. REP. No. 1584, at 1.

[187] Testimony of Mr. Henry C. Parke, Chairman, Merchant Marine Committee of the National Security Commission of the American Legion, *1956 Senate Hearings* 63. See also remarks of Senator Magnuson that the American Merchant Marine ". . . is literally the fourth arm of defense." *Id.* at 66.

[188] SEN. EXEC. REP. No. 10, 84th Cong., 1st Sess. 1 (1955).

[189] Treaty with Germany, *supra* art. XVII, 2.

[190] Quoted in *1954 House Hearings* 49.

[191] About 3% of the total exports and imports of the United States in 1953 and 1954 were subject to cargo preference, excluding military. Statement of the Maritime Administration in *1956 Senate Hear-*

enacted fifty-fifty cargo-preference legislation extending to all cargoes.[192] This, the Department of State has noted, is[193]

> . . . potentially the most dangerous of the discriminatory practices in the field of ocean shipping. . . . This practice . . . has appeared with alarming frequency as a provision in bilateral trade agreements. Pursued to its logical conclusion, this type of "bilateralism" would cause the degeneration of international economic relations from competition between private commercial interests to competition between governments.

Retaliation is encouraged,[194] raising shipping costs,[195] it is urged, and the Department of State is compromised by our own fifty-fifty laws in attempts to eliminate foreign discriminations.[196]

The Cargo Preference Act has been attacked in a recent economic analysis.[197] On the other hand, the House Committee on Merchant Marine and Fisheries has concluded shipments of surplus agricultural commodities are not delayed by reason of the Cargo Preference Act.[198] Furthermore, survival of the American-flag tramp fleet is dependent on the cargo-preference statutes.[199]

As far as national security is concerned, it has been argued that the chief lesson learned from experiences following Egypt's seizure of the Suez Canal in 1956 was ". . . that the United States cannot rely even on friendly nations to provide the ocean transportation vital to America's commerce and defense."[200]

ings 45. But see results of congressional attempts to explain the Cargo Preference Act abroad in House Comm. on Merchant Marine and Fisheries, *Committee Studies Overseas*, H.R. REP. No. 1682, 84th Cong., 2d Sess. (1956).

[192] See N.Y. Times, June 9, 1956, p. 17, col. 2; and *id.*, July 3, 1956, p. 50, col. 1. See also *Hearings on Discriminatory Acts of Foreign Governments Affecting our Merchant Marine Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. (1952).

[193] *1954 Senate Hearings* 7. Illustrative of the bilateralism condemned by the Department of State is the form of cargo preference established by the Soviet bloc in its foreign aid program with India. The Indo-Soviet Agreement of April 16, 1956, established a direct cargo service connecting Indian Ocean and Black Sea ports to provide 350,000 tons of Soviet commodities annually by six Soviet and six Indian vessels, totaling 55,000 gross registered tons. COUNCIL FOR ECONOMIC AND INDUSTRY RESEARCH, INC., SPECIAL SENATE COMMITTEE TO STUDY THE FOREIGN AID PROGRAM, 85TH CONG., 1ST SESS., FOREIGN ASSISTANCE ACTIVITIES OF THE COMMUNIST BLOC AND THEIR IMPLICATIONS FOR THE UNITED STATES 103 (Comm. Print 1957). "Under the Polish Agreement of May 16, 1956, three ships of each country were selected to carry the seaborne commerce between the two countries." U.S. DEP'T STATE, THE SINO-SOVIET ECONOMIC OFFENSIVE IN THE LESS DEVELOPED COUNTRIES 98 (Dept. of State Pub. No. 6632, Eur. and Brit. Commonwealth Ser. No. 51, 1958). See also 29 EASTERN ECONOMIST 606, col. 2 (1956).

[194] Statement of Norwegian Embassy in Washington on S. 3233. *1954 House Hearings* 47.

[195] Statement of Swedish Embassy in Washington on S. 3233. *Id.* at 49.

[196] *1954 Senate Hearings* 8.

[197] GORTER, *op. cit. supra* note 29. A 1951 economic analysis was dismissed by the House Committee on Merchant Marine and Fisheries in 1956 as past history, based on out-of-date facts. *Hearings on Operation and Administration of the Cargo Preference Act Before the House Committee on Merchant Marine and Fisheries*, 84th Cong., 2d Sess. 433-78 (1956).

[198] H.R. REP. No. 80, at 18.

[199] Statement of Maritime Administrator in *1956 Senate Hearings* 42.

[200] Maritime Affairs, March 1957, p. 3. A union representative points out the lack of loyalty screening for seamen on foreign-flag vessels. *1955 Admin. Hearings* 161. See also, *For War U.S. Would Need Her Own Merchant Fleet*, Saturday Evening Post, July 3, 1954, p. 10.

On the other hand, the Navy Department maintains American vessels flying some foreign flags are under effective United States control. *Hearings on Sale of Ships From Reserve Fleet Before the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 1st Sess. 213 (1957).

The workings of the Cargo Preference Act and related legislation are difficult to attack solely on the basis of a free-trade doctrine. Furthermore, there is no impressive evidence these laws significantly restrict foreign trade. On the other hand, administrative application of the fifty-fifty laws leaves much to be desired toward realizing the benefits of both cargo preference and the programs to which it applies. Since cargo preference increasingly seems a permanent fixture of our maritime scene, it is to be hoped that better methods of coping with it will be devised by the government agencies concerned.

FEDERAL REGULATION OF CARRIER SECURITIES

John R. Turney*

Issuance of capital securities by railroads and motor carriers is controlled and regulated by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act.[1] Securities of air and water carriers and freight-forwarders are included in those of commercial and industrial corporations, which are regulated by the Securities and Exchange Commission under provisions of the Securities Act of 1933.[2] This article attempts to survey, compare, and evaluate the federal regulation of the carrier securities of these two respective groups of carriers under the two acts. No effort will be made to review powers, procedures, activities, or decisions of commissions, except as they relate to the regulation of carrier securities.

I

Background

In England, legislative efforts to regulate the issuance of corporate securities seem to have begun with the "Bubble Act" of 1719.[3] It was only near the end of the nineteenth century, however, that a number of the state legislatures in this country, responding to a rising public demand, commenced to police the issuance of securities by public utilities, including railroads, and later securities generally, by both regulatory and Blue Sky laws.

The ICC first officially suggested that the issuance of carrier securities be regulated following its investigation of Harriman's use of railroad credit and funds to bring about common control of the Union Pacific, Southern Pacific, and Illinois Central Railroads. It said, "The time has come when some reasonable regulation should be imposed upon the issuance of securities . . .";[4] and in 1910, the Mann-Elkins Act provided for the appointment of a Commission by the President to investigate the proposal.[5] In the following decade, the ICC, both by formal recommendation and in its annual reports, and in connection with its investigation of alleged financial manipulation and "reckless and profligate financiering" of management and investment bankers, reiterated recommendations for federal regulation.[6]

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[1] 41 Stat. 494 (1920), 49 Stat. 557 (1935), 49 U.S.C. §§ 20a, 314 (1952).

[2] 48 Stat. 75, 15 U.S.C. § 77 (1952).

[3] The Bubble Companies Act, 1719, 7 Geo. 1, cc. 1, 2.

[4] Consolidations and Combinations of Carriers, 12 I.C.C. 277, 306 (1907).

[5] Act of June 18, 1910, ch. 309, § 16, 36 Stat. 556.

[6] *E.g.*, St. Louis & San Francisco R.R., 29 I.C.C. 139 (1914); New York Central & H. R.R., 30 I.C.C. 147 (1914); New York, N.H. & H. R.R., 31 I.C.C. 32 (1914); Chicago, R.I. & Pac. Ry., 36 I.C.C. 43 (1915); Pere Marquette R.R., 44 I.C.C. 1 (1917); Wabash Pittsburgh Terminal Ry., 48 I.C.C. 96 (1917).

In its 1919 annual report, the Commission, in response to a request of the Senate Committee on Interstate Commerce, said:[7]

> It would serve no good purpose to recite the many instances in comparatively recent years in which, through financial deals for which it is difficult to find any words of excuse, railroad properties have been bankrupted or saddled with almost overwhelming burdens of indebtedness, which have not increased the amount or value of property devoted to the public service, have not improved the service rendered, and have on the whole had the effect of increasing the charges for service. There should be some way by which under the law these things could be prevented. . . .
>
> The advisability, desirability, and propriety of public or governmental regulation of the issuance of securities by public-service corporations is conceded generally by thinking and fair-minded men. A proper Federal regulation of the issuance of securities by the corporations engaged in interstate transportation and supervision of the application of the proceeds therefrom would go far toward preventing the abuses referred to in the preceding paragraph. The Commission is on record for several years past as favoring such supervision and regulation of the issuance of securities.

The complete collapse of railroad credit resulting in part from these abuses and in part from the severe financial depression of 1914, together with the breakdown of service and the consequent seizure of the railroads by the federal government during the World War I, led to a demand by other public authorities, state commissions, and bankers, as well as railroad officers and directors, for the rehabilitation and support of railroad credit as indispensable to the development of an adequate transportation system.[8]

In the Transportation Act of 1920,[9] therefore, Congress added section 20a to the Interstate Commerce Act. This section, unlike the English laws, the state Blue Sky laws, and, to a lesser degree, the state public utility laws, had as its primary objective not the protection of the investing public from the distribution of fraudulent issues, but rather the establishment of a soundly-capitalized transportation industry, capable of adequate service at reasonable rates. The industry's credit had been impaired by, among other things, the improvident issuance of securities during the previous three decades. To accomplish this basic objective, section 20a imposed upon the Commission the duty not to pass upon the value or soundness of the securities from the investors' standpoint, but to regulate the purpose and necessity for their issuance, and the nature, terms, and conditions of the securities themselves.

Just as the scandals of railroad finance around the turn of the century led to the enactment of section 20a of the Interstate Commerce Act, the stock market crash of 1929 and the ensuing economic depression set the stage for the Securities Act of 1933 and the Securities Exchange Act of 1934.[10] These acts, disregarding the precedent of the Transportation Act of 1920 and reverting to the theory of the English laws

[7] ICC 33D ANN. REP. 5 (1919).

[8] See *Hearings Before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads* vol. 3, 65th Cong., 3d Sess. 1395 (1919).

[9] 41 Stat. 494, 49 U.S.C. § 20a (1952).

[10] 48 Stat. 881, 15 U.S.C. § 78 (1952).

and the state Blue Sky laws, are primarily compulsory-disclosure and compulsory "clean living" acts. They seek to protect the investor—first, by making available to him information upon which an intelligent investment decision can be based; and second, by outlawing fraudulent and wildcat practices in the distribution and sale of securities. The SEC, unlike the ICC, has no responsibility to control or regulate the issuer or the security itself, but merely to prevent fraud upon, and overreaching by, investors.

In 1935, despite the fact that the securities of motor carriers were then subject to the Securities Act, Congress, in the enactment of the Motor Carrier Act, reverted to the philosophy of the Transportation Act of 1920, and by section 214 of the Motor Carrier Act, it subjected motor-carrier securities to the provisions of section 20a of the Interstate Commerce Act.[11] It should be borne in mind that at that time there was no history of financial scandals in issuance or distribution of motor-carrier securities. In fact, with but few exceptions, largely in the motorbus field, motor carriers were small and had, up to that time, publicly offered only a very limited quantity of securities.

Under the Civil Aeronautics Act of 1938,[12] part three of the Interstate Commerce Act (regulating water carriers), enacted in 1940,[13] and part four (regulating freight-forwarders), enacted in 1942,[14] carrier securities were left to regulation under the Securities Act.[15]

II

JURISDICTION

Under the Interstate Commerce Act, a railroad or a motor carrier may lawfully issue a "security" or assume an obligation with respect to the securities of another only if and as authorized by the ICC. The Commission may authorize such issuance or assumption by a carrier only upon finding, after investigation, that its purposes and uses are:[16]

(a) for some lawful object within its corporate purposes and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and
(b) reasonably necessary and appropriate for such purpose.

The Commission may grant or deny the application in whole or in part, or grant it with such modifications or conditions as it considers necessary or appropriate.

[11] 49 Stat. 557 (1935), 49 U.S.C. § 314 (1952).
[12] 52 Stat. 977, 49 U.S.C. §§ 401-722 (1952).
[13] 54 Stat. 929, 49 U.S.C. §§ 901-23 (1952).
[14] 56 Stat. 284, 49 U.S.C. §§ 1001-22 (1952).
[15] Under § 77 of the Bankruptcy Act, 47 Stat. 1474 (1933), 11 U.S.C. §§ 205, 208 (1952), an elaborate procedure is provided for the reorganization of insolvent interstate railroads in which the ICC plays an important role. Provision for "voluntary" reorganization of railroads, the alteration of capital structures or the terms of outstanding securities, to forestall a financial crisis was added in 1948 by § 20b of the Interstate Commerce Act. 62 Stat. 162, 49 U.S.C. § 20b (1952).
[16] 41 Stat. 494 (1920), 49 U.S.C. § 20a (1952).

This jurisdiction is exclusive and plenary, and a carrier may issue securities and assume obligations so authorized without obtaining any other approval, state or federal. Thus, Congress has wholly pre-empted the field.[17] Securities issued without the Commission's authorization are void, and the persons responsible for their issuance are subject to civil and criminal penalties.[18]

Under the Securities Act, the use of any means or instrumentality of interstate transportation or communication to offer, advertise, or sell securities, except certain specifically exempted securities, is restricted to securities with respect to which a registration statement under the Act is in effect, and it must be accompanied by a prospectus which complies with the requirements of the Act.

A. Types of Securities the Issuance of Which Is Subject to Regulation

Section 20a of the Interstate Commerce Act applies to issuance of

> any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . ,

or assumption of

> any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person. . . .

In an early case, the Commission held that the provisions of section 20a of the Interstate Commerce Act were to be construed restrictively under the principle of *ejusdem generis* and hence "were intended to apply to instruments negotiable or quasi-negotiable in character" and similar in nature to the securities specified—*i.e.*, shares of stock, bonds, and notes.[19] A later decision of a division of the ICC that refused to follow this view with respect to motor-carrier issues was overruled by the entire Commission.[20] As a result, the ICC has held that mortgages, real or chattel, conditional sales contracts, loan or credit agreements, and leases or other contracts are not "securities" for which ICC authority is required, even if they contain an express promise to pay money or assume an obligation,[21] but that negotiable or

[17] Pittsburgh & W. V. Ry. v. ICC, 293 Fed. 1001 (D.C. Cir. 1923).

[18] Although the Act provides no means for validating unauthorized securities, St. Paul. & K. C. S. L. R.R. Bond, 180 I.C.C. 272 (1932); Great Southern Trucking Co. Notes, 282 I.C.C. 809 (1951), the Commission has authorized the issuance of a new security to replace the obligation represented by the void security. See Merchants Motor Freight, Inc., Note, 275 I.C.C. 817 (1951).

[19] Louisiana Ry & Nav. Co., Authority to Execute a Purchase Contract, 67 I.C.C. 808 (1921).

[20] Lehigh Valley R.R., Conditional Sales Contract, 233 I.C.C. 359 (1939). In 1955, the Commission referred to this case in recommending that § 20a of the Interstate Commerce Act be amended to include "any contract for the purchase or lease of equipment not to be fully performed within one year." A more appropriate and forthright amendment would strike out the limiting terms "share of capital stock or any bond or other," so that the Act would apply to "any evidence of interest in or indebtedness of the carrier." ICC 69TH ANN. REP. 124 (1955).

[21] See Hayes Freight Line, 39 M.C.C. 576 (1944); Hancock Truck Lines, 56 M.C.C. 276 (1949); Wilson Truck Co., Inc., 63 M.C.C. 223 (1954); Capital Transit Co., 40 M.C.C. 17 (1944); Texas & Pac. Ry., 271 I.C.C. 230 (1948). However, Division 4, in Transcontinental Bus System, Inc., Notes, Finance Docket No. 20382, ICC, Feb. 3, 1959, held that a loan agreement for a sum certain, with acknowledgment of receipt thereof by the borrower and a promise by the latter to pay the debt in fixed installments on specified dates with interest at a specified rate, has "substantially all of the attributes, except negotia-

"semi-negotiable" evidences of debt secured by such instruments are subject to the Interstate Commerce Act. (The term "semi-negotiable" is applied to an instrument which is "uttered" or capable of being "uttered"—*i.e.*, of being put in circulation where it can be "traded" as stocks and bonds are traded.)[22] This rule has been applied even where such an instrument expressly changes the terms, conditions, rights, or obligations under authorized outstanding issues.[23] Similarly, a binding and transferable contract to execute and deliver shares of stock, such as a stock option or warrant, also is not considered a security within the meaning of section 20a of the Interstate Commerce Act, since it merely represents a right to purchase such a security.[24] The ultimate issue of the stock itself would require prior Commission authorization, however; and both stock splits and stock dividends require Commission authorization, as both constitute the issue of securities.[25]

The Securities Act is applicable to "securities" such as notes, shares of stock, bonds, debentures, and any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. The term has been very broadly construed by the SEC and the courts[26] to include practically any instrument evidencing an interest or obligation.[27]

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bility, possessed by an ordinary promissory note" and "constitutes an evidence of indebtedness . . . within the meaning of such term as used in section 20a of the Interstate Commerce Act." The apparent contrary decision in the *Capital Transit* case, *supra*, was distinguished on the ground that there the agreement was for a loan in the future, conditional upon the happening of certain events, leaving uncertain the amount of the loan, whether it actually would be made, its date, and the amount and maturity of installment repayments.

[22] See Lehigh Valley R.R. Conditional Sales Contract, 233 I.C.C. 359 (1939). See also People v. Descant, 124 P.2d 864 (Cal. Dist. Ct. App. 1942).

[23] See United States v. New York, N.H. & H. R.R., Civil A No. 140-42, S.D.N.Y. Feb. 17, 1959, where the New Haven, in consideration of the purchase of certain of its outstanding preferred shares by a banking group, agreed to repurchase them at a price that would assure the bankers a profit of $10 per share. In this suit, the Government, upon behalf of the ICC, claimed that this instrument, in effect, changed the rights and liabilities of the preferred stock in so far as the involved shares were concerned; and that in this respect, the agreement was, in effect, an issuance requiring authorization similar in all respects to that which would be required in a case where the interest rates upon notes or the rights of preferred holders of securities originally authorized were subsequently changed. The district court sustained the contention of the defendants that the Commission's inaction for three years, despite the full knowledge of the fact, "shows that the challenged agreement is not within the purview of section 20a as construed and applied by the Commission since 1920 when the section was enacted." The circuit court of appeals, however, upon appeal of the companion case by a stockholder of the New Haven, overruled the decision of the district court and held that the agreement would be an amendment of the terms of the stock, which, while not an "issue"' in the corporation law sense, was within the jurisdiction of the ICC under § 20a.

[24] Western Maryland Ry. Stock, 295 I.C.C. 100, 102 (1955); Norfolk Southern R.R., 240 I.C.C. 99, 111 (1940).

[25] Capital Transit Co., 282 I.C.C. 77, *modified*, 282 I.C.C. 192 (1951); Midwest Transfer Co., 271 I.C.C. 796 (1949).

[26] SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943).

[27] Voting trust certificates, SEC Release No. 97, Dec. 28, 1933, pt. 1; Corporation Trust Co. v. Logan, 52 F. Supp. 999 (D. Del. 1943); extension of maturity on investment certificates, SEC v. Associated Gas & Electric Co., 24 F. Supp. 899 (S.D.N.Y.), *aff'd*, 99 F.2d 795 (2d Cir. 1938); receipts for oil when, as, and if produced, SEC v. Aldrich Blake, Inc. (S. Ct. D. C., May 19, 1936); receipts for loans by shareholders, SEC v. Sunbeam Gold Mines Co., (W.D. Wash., July 23, 1937), *rev'd on other grounds*, 95 F.2d 699 (9th Cir. 1938); receipts for personal loans, United States v. Monjar, 47 F. Supp. 421 (D. Del.

B. Issues Subject to Regulation Under the Acts

The Interstate Commerce Act applies to issues by the carrier, both nominal and actual. The Securities Act applies to the offering whether it be by the original issuer or by the holder of an existing security. Secondary offerings of securities of rail and motor carriers where the original issue was authorized by the ICC are not subject to either the Interstate Commerce Act or the Securities Act. The ICC treats execution and authentication alone, without pledge, transfer, or delivery to a third person, as a "nominal issue" requiring authorization. If pledge, transfer, or delivery are subsequently desired, additional authority must be obtained for the "actual issue," just as it must also be obtained for increases in interest rates. The Securities Act applies only to securities that are to be publicly offered; it is not concerned with either "nominal issues" or private placements.

The respective jurisdictions of the commissions are summarized in the following chart:

JURISDICTION TO REGULATE CARRIER SECURITIES

Issuers	*Interstate Commerce Commission*	*Securities & Exchange Commission*[28]
Railroads engaged in interstate commerce	Yes	No
Motor carriers engaged in interstate commerce having aggregate capitalization of over $1,000,000	Yes	No
Other rail and motor carriers	No	Yes
Air carriers, water carriers, & freight forwarders	No	Yes
Noncarrier holding companies authorized under the Interstate Commerce Act to control rail or motor carriers	Yes	No[29]
Governmental agencies, judicial or administrative officers	Yes	No
Nature of Issue		
Nominal issues	Yes	No
Secondary offerings	No	Some[30]

1942); investment contracts on profit sharing agreements, SEC v. Tung Corp. of America, 32 F. Supp. 371 (N.D. Ill. 1940); contracts for bottling and sale of whiskey, Penfield Co. of California v. SEC, 143 F.2d 746 (9th Cir.), *cert. denied*, 323 U.S. 768 (1944); chinchilla sales agreement, SEC v. Chinchilla, Inc. (N.D. N.Y. March 16, 1953); investment pool interests, SEC v. Wickham, 12 F. Supp. 245 (D. Minn. 1935); shares in fishing boats entitling owners to shares of profit, SEC v. Pyne, 39 F. Supp. 434 (D. Mass. 1941); oil lease coupled with a promise of development, SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943); franchise agreements to prospective automobile distributors, Tucker Corp., SEC Release No. 3236, June 26, 1947; SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65 (1959).

[28] Where "yes" occurs in this column, it covers only public offerings.

[29] § 7 of S. 1181, and H.R. 2481, pending in the 86th Congress sponsored by the SEC, would subject to the Securities Act holding companies that are "primarily engaged directly or indirectly in the business of investing, re-investing, owning, or trading in securities," even though they already are subject to Interstate Commerce Act.

[30] Rail or motor-carrier securities the original issue of which, for whatever reason, was not required to be authorized by the ICC.

Public offerings	Yes	Yes
Private placement	Yes[31]	No
Treasury re-issues	Yes	Yes
Stock dividends	Yes	No
Exchange of securities	Yes	Yes
Intrastate offerings	Yes[32]	No[33]
Kind or Amount of Issue		
Minimum issues	None	$300,000
Stock options or warrants	No	Yes
Capital issues (bonds, capital shares, long-term notes, voting trust certificates)	Yes	Yes
Transferable nonnegotiable contracts	No	Yes
Short-term obligations	Partly[34]	Partly[35]

Section 20a of the Interstate Commerce Act applies to common carriers by railroad, sleeping-car companies and motor carriers engaged in interstate or foreign commerce, and also, when ordered by the Commission, to noncarrier holding companies authorized under section 5(2) of the Interstate Commerce Act to control a carrier or carriers.[36] The Securities Act applies to securities that are not subject to the Interstate Commerce Act. This means that any issues of railroads or motor carriers exempt under section 20a of the Interstate Commerce Act, secondary offerings of such carriers, and security issues of air and water carriers and freight-forwarders are subject to the Securities Act to the same extent as noncarrier corporations.

III

STATUTORY STANDARDS

In light of the financial mismanagement of railroads prior to 1920, it is not difficult to understand why section 20a of the Interstate Commerce Act rigidly limits carrier issues to securities that are issued for a lawful (carrier) object; compatible

[31] Resale of rail securities issued prior to Feb. 28, 1920, and motor-carrier securities issued prior to Aug. 9, 1935, are exempt. Delaware, L. & W. Ry., Finance Docket No. 19335, I.C.C., Nov. 6, 1956; Eastern Mass. St. Ry. Stock, 37 M.C.C. 112 (1941); Chesapeake & O. Ry. Stock, 162 I.C.C. 689 (1930); Seaboard Air Line Equipment Trust Obligations, 105 I.C.C. 757 (1926); Bonds of Seaboard Air Line Ry., 99 I.C.C. 142 (1925).

[32] Interstate Commerce Act applies to issues of interstate carriers, regardless of the extent or area of distribution.

[33] The Securities Act exempts issues where the issuer and all purchasers reside and do business within a single state.

[34] Amounts equal to 5% of aggregate capitalization, and in case of motor carriers $200,000, are exempt; but this latter exemption does not create a cumulative exemption of $1,200,000. If the carrier has $1,000,000 in capital stock and a long-term debt outstanding, it can issue, without Commission approval, an additional $200,000 in short-term notes. If, on the other hand, however, it has more than $200,000 in short-term notes outstanding, they can be exempt only if those notes, taken together with the capital stock and long-term indebtedness, do not exceed $1,000,000. In short, the carrier may utilize either of the exemptions of § 20a, but not both, to issue short-term notes.

[35] The Securities Act exempts current transactions where maturity is 9 months or less, as well as all issues where total amount of issue is $300,000 or less.

[36] 24 Stat. 380 (1887), 49 U.S.C. § 5(2) (1952).

with the public interest; necessary, appropriate, or consistent with the performance of carrier service, without impairment; and also necessary and appropriate to accomplish that objective. The statutory standard of proof required by section 5(3) of the Interstate Commerce Act[37] of holding companies authorized under section 5(2) to control a rail or motor carrier or carriers is that the proposed issue or assumption is consistent with the proper performance of carrier service by the carrier subsidiary, will not impair the ability of such subsidiary to perform such service, and is otherwise consistent with the public interest.[38]

The statutory standard under the Securities Act is much simpler. The Commission must be satisfied that a complete, accurate, and honest disclosure has been made by the issuer of all information necessary in the public interest and for the protection of investors.[39]

IV

Administrative Policies

A. Purpose of Issue

SEC regulations require only that the purpose of the issue be fully disclosed. On the other hand, the ICC withholds authorization of all carrier securities except those involved in the acquisition or betterment of property or assets used or intended for continuing productive use in the service of transportation;[40] or to provide capital for the refunding of obligations issued for such purposes; or for the payment of carrier debt, including in some cases interest and dividends. It refuses to authorize issues by a carrier for noncarrier purposes, even in cases where capital is sought in behalf of a noncarrier subsidiary.[41] It also has refused to authorize an issue of stock the purpose of which was to assure continuity of management after the death of controlling stockholders as not being necessary or appropriate for the proper performance by the applicant of transportation service to the public; but upon reconsideration it held that since the action necessary to assure such continuity rested in the future discretion of the applicant's directors, it was without jurisdiction to apply the above dictum.[42]

B. Capitalization of Surplus

In two cases that arose shortly after the enactment of section 20a of the Interstate Commerce Act,[43] the carriers sought to capitalize earned surplus by the issuance of stock dividends. Rejecting the contention of the carriers in these cases that they had the legal right so to capitalize their surplus, the ICC held that compatibility with

[37] 24 Stat. 380 (1887), 49 U.S.C. § 5(3) (1952).

[38] Ryder System, Inc. Stock, 295 I.C.C. 626 (1957).

[39] 48 Stat. 78, 79 (1933), 15 U.S.C. §§ 77g, 77h (1952).

[40] Securities of Louisville & N. R.R., 76 I.C.C. 718 (1923).

[41] Consolidated Freightways, Inc. Stock, 282 I.C.C. 616 (1952).

[42] Commercial Motor Freight, Inc. Stock, 290 I.C.C. 94 (1953), *rev'd*, 290 I.C.C. 349 (1954).

[43] Securities of Louisville & N. R.R., 76 I.C.C. 718 (1923); Delaware, L. & W. R.R., 67 I.C.C. 426, 433 (1921).

the public interest required that "a substantial surplus remain uncapitalized as a support for the applicant's credit, providing for emergency needs, offsetting obsolescence and necessary investments in nonrevenue-producing property, and serving as a general financial balance-wheel. . . ." This view assumes that corporate surplus and cash are equivalent and that the alternative to a stock dividend paid out of surplus is the investment of cash for some of the purposes mentioned in the above quotation. The exact contrary, however, is true in many cases. Whether the surplus has already been invested in carrier property, as is true in the great majority of cases, or is represented by cash, the declaration of the stock dividend acts as a permanent capitalization of the retained earnings. Otherwise, since the Commission has no control over the payment of cash dividends, these earnings could, under most, if not all, state corporation laws be used to pay cash dividends. These facts were later realized in a case where capital surplus, as distinct from earned surplus, was sought to be capitalized.[44]

C. Assets Capitalizable

The question of whether a particular asset is "capitalizable," as that term is used by the ICC, becomes important in either of two events: (1) where the carrier proposes to issue securities to acquire a particular asset; and (2) in fixing the maximum amount of securities that can be issued compatibly with the public interest. Assets that are held to be "capitalizable" are those presently in, or which are intended for, continuing productive use in transportation.[45] These include:

1. Working capital (which is treated as the net excess of current assets over current liabilities, but not to an "unreasonable" amount; the maximum is usually related to average monthly cash operating expenses—*i.e.*, exclusive of depreciation).[46]
2. Original cost to carrier, predecessor, or vendor of tangible carrier operating property actually in use or to be immediately used.
3. Investment in securities (but not advances which are said to be "flexible"[47] of owned or controlled carrier or carrier-purposed subsidiaries).

D. Maximum Capitalization

In two early cases,[48] the ICC laid down what has come to be known as the capitalizable-assets rule. Where shares of stock are proposed to be issued as a stock dividend, the aggregate capital liability to be created—consisting of (a) all long-term debt obligations; and (b) all outstanding capital stock, taken at par if of par value, otherwise at fair market value as of original date of issue, plus premium on capital stock—could not exceed the sum of its capitalizable assets as that term has

[44] Chicago, M., St. P. & Pac. R.R. Bonds, 193 I.C.C. 725, 730 (1933).
[45] Securities of Louisville & N. R.R., 76 I.C.C. 718 (1923).
[46] Missouri Pac. R.R. Bonds, 180 I.C.C. 352 (1932).
[47] Central Freight Lines, Inc. Stock, Finance Docket No. 19127, ICC, Feb. 6, 1956.
[48] Securities of Louisville & N. R.R., 76 I.C.C. 718 (1923); Delaware, L. & W. R.R., 67 I.C.C. 426 (1921).

been defined.[49] This rule has been extended to cover debt and stock issues incident to the acquisition of another carrier where the property to be received is partly intangible. While the Commission will approve the acquisition of the latter for a reasonable consideration in cash or securities, it will not permit the issuance of securities to an amount that will cause the aggregate capital obligations, as calculated above, after the unification to exceed the aggregate capitalizable assets of the unified property.

This rule has been relaxed in recent cases, both rail and motor carrier, to permit temporary overcapitalization where the issue is necessary to preserve a going concern,[50] or where the issue of stock is necessary to provide funds for payment of maturing debt,[51] or where there is a present deficit in capitalizable assets that will not be increased by the proposed issue.[52]

The objective of this rule is to prevent overcapitalization of carriers. The ICC seeks to determine the fact of overcapitalization by a formula that balances the book value of investments in tangible carrier property against the investment by creditors and stockholders in the carrier's securities. Assuming that the actual investment of the carrier is correctly recorded on the asset side, it does not actually or purportedly represent the present value of those assets, much less the value, of the carrier's going business. On the other hand, while the amount of outstanding debt does correctly represent a capital obligation, the amount of the capital stock (and premium) represents no obligation of the carrier, but merely the amount which the owners paid for their equity in the property. Even if the formula were sound from an accounting standpoint (which it is not), it provides, at most, an irrelevant and unlawful basis for either authorization or denial of security issues.

Generally accepted accounting principles require that property acquired by a corporation be recorded in the investment account at the purchaser's actual cost. The uniform rules promulgated by the ICC to govern motor-carrier accounts follow that principle in all cases, with a single, but very important, exception—namely, where carrier-operating property (terminals, equipment, etc.) is acquired in a transaction in which the carrier also acquires any operating authority from another carrier, the purchasing carrier's investment is limited to the original cost to the vendor carrier.[53] The amount of the purchasing carrier's investment in excess of the selling carrier's original cost is required to be accounted for as an intangible, which is not capitalizable. In recent years, due chiefly to inflation but partly to appreciation in

[49] Roscoe, Snyder & Pac. Ry. Securities, 170 I.C.C. 403 (1931). In Stock Dividend of Oahu Ry. & Land Co., 86 I.C.C. 137 (1923), the ICC said that appreciation of assets not realized by sale or otherwise is not capitalizable.

[50] Howard Van Lines, Inc., 70 M.C.C. 389, 404-05 (1957); General Expressways, Ltd. Merger, 65 M.C.C. 377, 386 (1955); C. & R. Trans., Inc., 60 M.C.C. 173, 195 (1954); Transcontinental Bus System, Inc., 50 M.C.C. 525 (1948).

[51] Southeastern Greyhound Lines, 15 M.C.C. 117 (1938); Stock of New York, N.H., & H. R.R., 131 I.C.C. 233 (1927).

[52] Ryder System, Inc., Stock, Finance Docket No. 20437, I.C.C., March 18, 1959.

[53] Uniform System of Accounts for Class I Motor Carriers of Property, Instruction 19, 49 C.F.R. § 182.01-19 (1949).

terminal properties, it happens that where a carrier has purchased substantial carrier-owned assets, its actual investment will exceed its book investment in the particular property by millions of dollars; and its ability to issue securities is thereby drastically restricted. As the result of the application of the formula, the normal and healthy growth of a carrier whose successful past operations have resulted in market prices for shares of its capital stock substantially above the book value of those shares may be frustrated.

From a transportation standpoint, the evil of carrier overcapitalization lies in the fact that where the earnings are insufficient to service the capitalization, funds required for adequate service, maintenance, and safety of operation are very likely to be diverted from such purposes and applied to fixed charges or dividends. This is but another way of saying that capitalization is the handmaiden of earning power, and that so long as earnings are sufficient to service it, there is no overcapitalization. This leads to the conclusion that security issues to obtain assets necessary for carrier service, efficiency, and economy should be externally limited only by the ability of the carrier's earning power adequately to service them.

In administering its duties in railroad reorganization under section seventy-seven of the Bankruptcy Act,[54] the ICC recognized the foregoing principle. In every reorganization case, and with the complete approval of the Supreme Court,[55] the Commission determined the maximum capitalization of the reorganized company by capitalizing its future prospective earnings. Strangely enough, it has expressly rejected this sound method in determining maximum capitalization under sections 20a and 214 of the Interstate Commerce Act,[56] although it has held, and correctly, that despite an excess of capitalizable assets under the formula, it will not authorize issues beyond the earning power of the carrier adequately to service them.[57]

The SEC requires complete disclosure of the use to which the proceeds of a proposed issue are to be put. Under section 20a(10) of the Interstate Commerce Act, the ICC must require periodic or special reports showing the disposition of the securities authorized and the application of the proceeds thereof.[58]

The ICC holds that although a carrier may have capitalizable assets ample to support a proposed issue and prospective earnings ample to service it, and although its equity-debt ratio would be improved thereby, the carrier must, nevertheless, demonstrate that the proposed issue is necessary for its operation.[59] The ICC will determine the reasonableness of the proposed issue with respect to the kind and

[54] 47 Stat. 1474 (1933), 11 U.S.C. §§ 205, 208 (1952).

[55] Institutional Investors v. Chicago, M., St. P. & Pac. R.R., 318 U.S. 523, 539 (1942); Wisconsin Cent. Ry., 282 I.C.C. 567, 579 (1952); Missouri Pac. R.R. Reorganization, 257 I.C.C. 479, 522 (1944).

[56] Grand Trunk W. R.R., 158 I.C.C. 117 (1929).

[57] Louisiana Ry. & Nav. Co. of Texas, 99 I.C.C. 357 (1925).

[58] An alleged failure to police such application was criticized in the report of the House of Representatives Oversight Committee, H.R. REP. No. 2711, 85th Cong., 2d Sess. 57 (1959), in the case of the proceeds of an issue used by the St. Louis & S.F. R.R. to acquire control of the Central of Georgia Ry. without prior ICC authorization. Central of Georgia Ry. Control, Finance Docket No. 19159, ICC, Nov. 14, 1958.

[59] Erie R.R., 138 I.C.C. 527 (1928).

duration of the securities and their discount, interest, and redemption provisions. If the issue is for acquisition of property, the applicant must show that the consideration proposed to be paid is fair and reasonable. In the case of rail securities, the applicant, except where an exemption is specifically made, must sell them at competitive bidding.

V

ADMINISTRATIVE PROCEDURE AND ACTION

A proceeding for the authorization by the ICC of the proposed issue of securities commences with the filing of an application containing complete information concerning the proposed issue in a form prescribed by the Commission.[60] When this application is filed, the Commission causes a notice, accompanied by a copy of the application, to be filed with the governor of each state in which the applicant operates and inquires whether he or some other appropriate authority of the state desires to be heard. The state authorities have the right to make representations designed to conserve the rights and interests of any of their citizens who may be involved in the proceeding. Petitions to intervene may also be filed by other persons who are able to show an interest in the proceeding. The ICC will conduct a public hearing where it deems this necessary; but in the great majority of cases, no such hearing is held.[61] Where a public hearing is held, however, it is governed by the Administrative Procedure Act.[62] Generally, a proposed report by the hearing officer is filed. The formal order is then entered by the ICC, usually by Division Four, granting or denying authority for the issue.

Under section 6(a) of the Securities Act,[63] the issuer of a proposed security files with the SEC a registration statement containing the information hereinafter described and pays as a filing fee 1/100 of one per cent of the maximum aggregate price at which the securities are to be offered, but not less than $25.00. If the registration statement is complete and accurate and complies in all material respects with the requirements of the statute and the regulations of the Commission, it becomes effective twenty days after the filing, unless the Commission fixes an earlier date. Where the registration statement is incomplete or inaccurate on its face, the SEC may, by personal and telegraphic service within ten days after the filing, call this to the attention of the issuer. Within ten days thereafter, it may issue an order refusing to permit the registration to become effective until it has been amended. If the amendment is filed after the time when the registration would have become effective, the SEC is also authorized to issue a stop order suspending the effectiveness of the registration statement, if at that time it finds that the registration statement includes an untrue statement or fails to state a material fact. It is further empowered to

[60] 49 C.F.R. § 56 (1949).

[61] In the years 1957 and 1958, where the applications did not involve sections of the Act other than section 20a, hearings were held in only 4 of 133 proceedings.

[62] 60 Stat. 237-44 (1946), 5 U.S.C. §§ 1001-11 (1952).

[63] 48 Stat. 78 (1933), 15 U.S.C. § 77f(a) (1952).

make an examination in any case to determine whether or not a stop order should be issued.

Under both the Interstate Commerce and the Securities Acts, the commissions require information respecting:

1. the organization, financial structure, nature of business;
2. the terms, position, rights, and privileges of different classes of securities of the issuer presently outstanding;
3. terms of the offering to the public of the issue;
4. underwriters;
5. balance sheet and income statements;
6. articles of incorporation and by-laws;
7. underwriting agreements; and
8. plans of acquisition or reorganization that are involved.[64]

The Securities Act and the regulations of the SEC under the Act require and prescribe the contents of a prospectus or offering circular under which securities must be offered to the public. The same requirements for candor and completeness of information, as well as absence of misleading or fraudulent representations, that apply to the registration statement also apply to this prospectus. There is no similar requirement in section 20a of the Interstate Commerce Act or in ICC regulations thereunder. However, when the issue is underwritten by an investment banker and publicly offered, an offering circular complying with practically all of the requirements of the SEC regulations is usually used in the sale and marketing. In many, if not most, cases where a public offering is made, the Bureau of Finance of the ICC requests that a copy of the offering circular be filed with the Commission, and generally in advance of the final order of authorization. Preparation and filing of such a document should be made mandatory.

From the foregoing, it should be clear that the facts upon which the two commissions exercise their statutory powers and discharge their statutory duties are very similar. Likewise, the ultimate result of the administrative action of both commissions—*i.e.*, the issuance or nonissuance of the proposed securities—is precisely the same. The difference, however, lies not only in the nature of the authority exercised, but in the consideration given to the facts developed by the administrative

[64] ICC: 49 C.F.R. §§ 56.1, 56.2 (1949); SEC: 48 Stat. 88, 91 (1933), 15 U.S.C. § 77aa, Schedule A (1952), Form S-1 and Regulation S-X. In addition to the above, the SEC Form S-1 and Regulation S-X require the following information not required in the ICC application, but which is contained in the carrier's annual report filed with the ICC: "Description of carrier property, carrier's officers, directors and principal stockholders, subsidiaries, franchises, material contracts, capitalization, sales of existing securities by applicant, sales of same to particular persons, remuneration, bonus, profit sharing, management and service contracts and agreements and amounts owing company; detailed financial statements, supporting balance sheet and income statements, voting trust agreements." The SEC Form and Regulation also require the following information which is not required by the ICC: "A full and candid prospectus, indemnification of officers and directors, options on securities, warrants and rights, relation with experts, accounting treatment of stock being registered, foreign patents held, terms of the offerings of previous issues."

investigation. In the case of the ICC, the security is issued or not depending on whether the Commission finds that from the standpoint of the particular carrier and of the general transportation service, the issue of this security will be beneficial. For all practical purposes, the ICC exercises the power of a supermanagement to determine whether the proposal is a provident one. On the other hand, the consideration given to the same facts by the SEC in a carrier proceeding is not whether the proposed issue is prudent or provident from a carrier or public standpoint, but whether, from the standpoint of a potential investor, a full disclosure of all relevant facts is made upon which he can exercise his independent judgment as to the value of the proffered security.

In applying the respective statutory standards, an entirely different type of expertise is required as between the two commissions. In dealing with railroads and motor carriers, the ICC utilizes the knowledge that it and its staff have accumulated over the years with respect to the operations, traffic, and financial needs of the carriers. Even though the jurisdiction that the ICC exercises is restricted to these two forms of transportation, a tremendous amount of information, experience, and expertise must be accumulated. Even were it desirable from economic or political standpoints, it would seem beyond the capacity of an administrative agency to exercise the managerial functions over security issues of all American industry and business such as those the ICC exercises over issues of railroads and motor carriers. As a result, therefore, the expertise which the SEC has acquired is confined almost, if not entirely, to the field of finance and to the branches of law relating to the prevention and punishment of fraud.

VI

TIME LAG

One of the purposes in the enactment of section 20a of the Interstate Commerce Act was to obtain expedition in the handling of railroad securities and to avoid the delay involved in complying with the security laws of the states in which the carrier operated.[65] In reporting the bill, the House Committee on Interstate and Foreign

[65] Thus, in the 1919 hearings before the Senate Committee on Interstate Commerce, the chairman of the California Railroad Commission urged: ". . . that the necessary machinery [be] given to the Interstate Commerce Commission so that it can handle these matters promptly. There is no branch of public regulation of railroads that so much requires prompt action as the issue of securities." *Hearings Before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads* vol. 3, 65th Cong., 3d Sess. 1395 (1919). Likewise, a representative of the railroads emphasized: "In this connection, I should like to emphasize the importance of time in transactions involving the sale of corporate securities. Bankers are almost indispensable in floating large issues; but bankers never buy such securities to keep—only to sell. Their function is precisely that of the ordinary merchant, except that they count on making quicker sales, and therefore work on a smaller margin of profit, than the ordinary merchant makes of his merchandise. When bankers make an offer for an issue of bonds or stock they base their price upon current financial conditions and quotations, expecting to make a quick turnover. If they are required to wait for the delivery of the securities, they reduce the price to cover the risks of financial changes in the meantime, and the seller gets less for his securities. If the period of waiting is long or indefinite and the transaction is a large one, bankers sometimes will not buy at all—particularly if the financial world has any menacing features." *Id.* vol. 2, at 663. See also *id.* at 82-83.

Commerce stated that:[66]

> The enactment of the pending bill will put the control of stock and bond issues exclusively in the hands of the Federal government and will result in uniformity and *greater promptness of action.*

This is also indicated by the fact that hearings are not required, although permissive under the Act, thereby eliminating the necessity for a formal evidentiary record that generally is required in other proceedings. Also, by the provisions of paragraph eleven of section 20a of the Interstate Commerce Act, no security issued in accordance with the authorization of the Commission

> . . . shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.

In the Securities Act, Congress also recognized the need for speed in passing upon security issues, and to that end, it provided deadlines of ten and twenty days in which the SEC, under ordinary circumstances, is required to act.[67]

The time required for processing applications by the ICC is not strictly comparable with that required by the SEC because of (1) the greater responsibility with respect to the decisions; (2) the complexity of the technical problems that it must face in considering any security issue; (3) the fact that notice must be given to the governors of the states in which the carrier operates; and (4) the preparation of a report describing in detail the application, the information relating to the providence of the issue and its conclusions with respect thereto, and the formal order of authorization or disapproval. None of these is required of the SEC, except in cases where the requirements of the Securities Act and the regulations with respect to the registration are not met.

The Securities Act fixes twenty days as the time after which a filed registration statement will become effective, unless the SEC finds that it will not be able to complete the processing of the statement within that time or a material amendment has been requested by a letter of comment—in which case, the issuer will be asked to file a delaying amendment. The Commission, under certain circumstances, has the power to accelerate the effective date of a registration statement, but this is infrequently done.

That the SEC is keenly aware of the need for speed is shown in its 24th Annual Report to Congress for the year ended June 30, 1958, in which it stated that the median time required from the date of filing to the effective date of a registration statement under the Securities Act was twenty-four days,[68] as compared with

[66] H.R. REP. No. 456, 66th Cong., 1st Sess. 21 (1919). (Emphasis added.)

[67] 48 Stat. 79 (1933), 15 U.S.C. § 77h (1952).

[68] SEC 24TH ANN. REP. 30 (1958). Broken down as follows:
(a) 14 days from the date of filing to the date of the letter of comment;
(b) 6 days from the date of the letter of comment to the date of the filing of the first material amendment; and
(c) 4 days from the date of the filing of the first amendment to the date of filing the final amendment and effective date of registration.

twenty-three days during each of the previous two years. The Report adds:[69]

This increased average lapsed time is a matter of concern to the Commission. It is being carefully watched and all appropriate steps are being taken to reduce the time lapse as much as possible, including steps to cure personnel shortages.

There appears in the margin[70] an analysis of the handling of registration statements during the calendar year 1958, which has been obtained through the courtesy of the staff of the SEC.

Of the 370 applications processed by the ICC during the period Janaury 1, 1957, to April 28, 1959, forty-three were involved with other applications under the Interstate Commerce Act, principally in connection with authority to consolidate or unify under section five; and in a number of instances, formal hearings were held. Since the processing of these latter applications cannot in any way be compared with the processing of a registration statement under the Securities Act, they have been excluded from the analysis.

During the year 1957, 179 applications for authority to issue securities we processed by the ICC (175 without hearing), of which 128 involved railroads and fifty-one involved motor carriers. The median time required for processing was twenty-eight days for rail applications, thirty-six for motor-carrier applications, and twenty-nine days for all applications. The minimum time was fifteen days, and the maximum was 196 days.[71]

[69] *Id.* at 30.

[70] Elapsed Days for Effectiveness of SEC Registration Statements
Calendar Year 1958

Days	Registrations	Cumulative %
10 or less	6	0.9
11-15	11	2.5
16-19	126	21.1
20-24	202	50.3
25-29	89	63.3
30-34	46	70.0
35-39	43	76.3
40-49	43	82.5
50-60	14	85.9
Over 60	99	100.0

[71] Elapsed Days for ICC Security Authorizations
Year 1957

Days	RAILROADS		MOTOR CARRIERS	
	Applications	Cum. %	Applications	Cum. %
Under 20	17	13	2	4
20-24	27	34	5	5
25-29	32	59	9	31
30-34	24	78	4	39
35-39	8	85	12	63
40-49	9	91	7	76
50-59	1	92	6	87
60-79	4	95	2	92
80-99	1	96	2	96
100-119	3	98	1	98
Over 120	2	100	1	100
Total	128		51	

From January 1, 1958, to April 28, 1959, 150 security applications were processed by the ICC without hearing, of which ninety-nine involved railroads and fifty-one involved motor carriers. The median time required for processing was twenty-nine days for rail application, forty-one days for motor-carrier applications, and thirty-one days for all applications. The minimum time was twelve days, and the maximum was 375 days.[72]

Prior to 1958 the ICC staff freely conferred with parties and counsel in noncontested proceedings; in 1958, it was forbidden to continue such conferences. In marked contrast to this policy, the SEC encourages registrants and their counsel to confer freely with its staff, and this practice enhances mutual understanding of one another's problems and greatly expedites processing.

As indicated above, the median time required for processing motor-carrier applications was twenty-seven per cent longer in 1957 and forty per cent longer in 1958 than the time required for processing rail applications. A case-by-case examination does not reveal a satisfactory explanation for this. In the detailed analysis of the fifty 1958 issues,[73] the percentages of the issues disposed of (by public offerings and private placements) for both rails and motor carriers were quite similar. Although these are the critical issues that demand the most expeditious handling, they required a longer period for processing than did issues of stock dividends. The suggestion that greater time was required for processing motor-carrier than for processing rail issues because of imperfect applications seems not to be well taken in view of the fact that the necessity for supplementation was about the same in both cases.

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Elapsed Days for ICC Security Authorizations
Jan. 1, 1958-Feb. 9, 1959

Days	Railroads: Applications	Railroads: Cum. %	Motor Carriers: Applications	Motor Carriers: Cum. %
Under 20	7	7	4	8
20-24	24	31	10	28
25-29	20	51	8	44
30-34	15	66	1	46
35-39	10	76	1	47
40-49	8	84	8	63
50-59	5	89	7	77
60-79	6	95	2	81
80-99	2	97	4	89
100-119	0	97	5	98
Over 120	2	100	1	100
Total	99		51	

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Analysis of 1958 Processing of 50 Security Applications by ICC

	Public Offerings		Private Placement		"Nominal" Issues		Stock Dividends	
	Rail	Motor	Rail	Motor	Rail	Motor	Rail	Motor
Per Cent of Issues	20	21	33	26	30	11	17	42
Median Time Lag (Days)	31	40	49	56	35	49	25	30
Per Cent Supplemented	100	100	70	80	44	50	40	17
Per Cent Amended	—	—	—	20	22	—	—	—

Since substantially the same factual information is examined by the staffs of both the Commissions, it would appear possible to reduce the period for ICC processing of these applications substantially below the 1958 level. The relatively poor performance in 1958 as compared with the SEC, is, in the writer's opinion, largely due to excessive judicialization of the process that the ICC has imposed upon its highly competent, but overworked and inadequate, staff.

VII

Conclusion

In view of the long and successful administration of section 20a of the Interstate Commerce Act prior to 1958, there would seem to be no reason, at least at this time, to repeal that section and permit security issues of railroads and motor carriers to be governed by the provisions of the Securities Act. Because they are much less important from the standpoint of their effect upon the national transportation system, there would be less objection to the transfer of motor-carrier security issues to the SEC than there would be to the transfer of the greater and more important railroad issues.

Moreover, it is believed that the ICC can, without statutory change, make procedural changes in the processing of security issues that would greatly reduce the time required for their authorization. The Commission has gained sufficient experience in the thirty-nine years during which it has administered the statutory standards of section 20a of the Interstate Commerce Act to define by administrative rule-making the requirements that any class of security issue must meet in order to conform to the statutory standards.[74] Once requirements are clearly defined, it will be possible to adopt the SEC procedure of determining from the face of the application and supporting information whether or not a particular issue meets those requirements.[75] In such cases, all that is required would be an order of authorization unaccompanied by a report.[76] And in connection with such a procedure, the Commission should fix definite deadlines, approximately, if not exactly, the same as the deadlines fixed by statute in the case of the SEC. Under such circumstances,

[74] Such specific standards might embrace: (1) the particular purposes for which security issues will be authorized; (2) the conditions under which capitalization of surplus will be permitted; (3) a clear definition as to the particular assets which are "capitalizable"; (4) a sound formula by which the working capital required can be determined; (5) the precise rules governing maximum capitalization; (6) the extent to which the earnings of the company must be sufficient to service proposed debt issues and to provide some return to stockholders; (7) the manner in which the proceeds are to be used; (8) limitations upon the amount of debt as compared with equity securities; (9) reasonable terms with respect to time, duration, discounts, interest rates, redemption provisions, bankers' spread or commission, etc.

[75] There are, of course, proceedings in which a report as well as an order is necessary; but even in such cases, the recital of statistical information contained in the application would seem to impose an unnecessary burden and expense upon the Commission's staff. Also, of course, orders would be necessary, or at least appropriate, where an application was denied or more onerous terms or conditions imposed than those proposed in the application. A case by case inspection of 172 rail and motor-carrier applications in 1957 and 1958 indicates that in very few was a report necessary.

[76] ICC processing undoubtedly would be speeded by amending the regulations to require all of the factual information of an SEC registration statement, for much of which the ICC staff must resort to annual reports of the carrier.

it should be able to obtain congressional authorization of a sufficient staff to meet them.

The ICC, in administering section 20a of the Interstate Commerce Act, would also greatly increase benefits to the public if, in fixing the requirements necessary to meet the statutory standards, it should find that the public requires the same complete and accurate disclosures with respect to a proposed issue as is required by the SEC under the Securities Act. Then, in the case of public offerings, the ICC should implement this finding not only by provisions designed to deny applications where such disclosure is not fully made, but also by assumption of the control of the offering through requiring and regulating a prospectus or offering circular. In this connection, sound transportation as well as comity would seem to require close cooperation in this area between the ICC and the SEC in conforming their regulations.

FEDERAL REGULATION OF DOMESTIC SMALL-SHIPMENT SERVICES—AN ECONOMIC APPRAISAL*

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Domestic small-shipment services[1] have always been an important,[2] troublesome,[3] and controversial[4] transportation problem for users, carriers, and the federal govern-

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[1] The term "small shipment" has no universal definition. Under carrier tariff provisions, there are two concepts, maximum weight and size (parcel post), and residual weight—that is, individual shipments billed weighing less than the weight required for quantity rates (all other carriers). For statistical purposes, the ICC includes only shipments weighing under 10,000 pounds, and the CAB makes no distinction between small and large shipments in published statistics. Unrevised Commission data for 1951 indicates that shipments weighing 300 pounds or less constitute over 90% of the small shipments under 10,000 pounds and about one third of the total small-shipment weight. U.S. BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, ICC, STATISTICS OF SMALL SHIPMENTS, STATEMENT No. 5325 (1953). Small shipments consist primarily of finished products of manufacturing and move in both straight and mixed lots.

The term "small-shipment services" includes services performed for individual small shipments as defined and for a number of shipments concentrated and billed under quantity rates. Services usually consist of assembling, concentrating, interterminal movement of bulk, separating, and distributing processes. Concentrating and separating are performed at times by noncarrier enterprises.

Services are performed by direct carriers (air, highway, rail, water) and are provided by indirect carriers (express, freight forwarder, parcel post), which in part employ the services of direct carriers, particularly for interterminal movement of bulk. Regulated, exempt, and private direct and indirect carriers engage in small-shipment services. Interterminal movement of bulk is performed primarily by regulated direct common carriers.

With respect to regulated carriers only, highway common carriers of general commodities account for about two-thirds of the total weight (individual and concentrated lots), and the parcel post handles about three-quarters of the total shipments, almost all of which are single pieces. Under regulated carrier services, rules, and charges, discernible differences appear by type of carrier in average weight per shipment, weight per piece, and length of haul. Traffic tends to be concentrated regionally, along certain routes, between metropolitan areas, and among a limited number of carriers of each type.

[2] Small-shipment traffic in recent years (including concentrated lots) is estimated by the writer to exceed annually 1,500,000,000 shipments, which weigh in excess of 125,000,000 tons, a majority of the total shipments of all weights and a less significant portion of total weight shipped.

Small-shipment services are used primarily by business firms (manufacturers, wholesalers, retailers) rather than by individuals. Large firms appear to account for most of the weight shipped.

Individual small shipments are significantly less important to rail and to water carriers as a source of freight revenue than they are to other direct and indirect carriers, which derive from 50 to 100% of freight revenue from small shipments. Concentrated lots of small shipments, however, are an important source of freight revenue for a number of railroads and some water carriers.

[3] Costs of assembling, concentrating, separating, and distributing per shipment are higher, and user requirements are increasingly more diverse, complex, and urgent, than they are for large shipments. Service to and from small localities is often inferior compared with service between large cities, and sometimes total charges are greater, weight and distance considered.

[4] *Supra* note 3. In addition, rate relationships between small and large shipments have always been controversial. This controversy has affected, and has been affected by, market competition among institutions, or channels of trade, and among areas or localities. Increased carrier competition during the

ment.[5] The problem primarily involves capacity, organization, and rates.[6] Federal policy and regulation of small-shipment services has encouraged (1) imbalance in capacity and uneconomic organization of the means of supply; and (2) rates based largely upon demand rather than cost of service. Review of the causes and results of federal policy leads to the conclusion that the public interest will be best served by relaxing regulation.

I

IMBALANCES IN CAPACITY AND UNECONOMIC ORGANIZATION

A. Causes

Capacity and organization of regulated small-shipment services developed without over-all plan[7] and, in large measure, without reference to technical possibilities or to

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past thirty years, particularly between highway and rail carriers, and to a lesser extent between carriers of the same type, has caused considerable controversy, which has, in turn, intensified the controversy about rate relationships and market competition.

[5] Factual and interpretive federal publications which give insight into the evolution of this problem include FEDERAL COORDINATOR OF TRANSPORTATION, MERCHANDISE TRAFFIC REPORT (1934); *Hearings Before the Subcommittee of the Senate Committee on Interstate Commerce on S. Res. 146, Less-Than-Carload Freight Traffic and Forwarder Carload Traffic*, 76th Cong., 3d Sess. (1940); *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 3684, Regulation of Freight Forwarders*, 77th Cong., 1st Sess. (1941); *Hearings Before the Senate Committee on Interstate and Foreign Commerce on H. R. 2674, Services of Freight Forwarders*, 79th Cong., 2d Sess. (1946); *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 5967, Freight Forwarders*, 81st Cong., 2d Sess. (1950); *Hearings Before the Subcommittee on Domestic Land and Water Transportation of the Senate Committee on Interstate and Foreign Commerce on S. Res. 50, Study of Domestic Land and Water Transportation*, 81st Cong., 2d Sess. (1950); *Hearings Before the Senate Committee on Interstate and Foreign Commerce on Bills Relative to Domestic Land and Water Transportation*, 82d Cong., 2d Sess. (1952); Motor Bus and Motor Truck Operation, 140 I.C.C. 685 (1928); Coordination of Motor Transportation, 182 I.C.C. 263 (1932); ICC ANN. REP. (1946 to date); U.S. BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, ICC, HISTORICAL DEVELOPMENT OF TRANSPORT COORDINATION AND INTEGRATION IN THE UNITED STATES, STATEMENT 5015 (1950); *id.*, RAIL-WATER RATE ADJUSTMENTS, STATEMENT 5427 (154); *id.*, INTERAGENCY RATE ADJUSTMENTS—RAIL AND MOTOR—STATEMENT 567 (1956); CAB ANN. REP. (1944 to date); Railway Express Agency, Grandfather Certificate, 2 C.A.B. 531 (1941); Railway Express Agreement, 4 C.A.B. 157 (1943); Air Freight Rate Investigation, 9 C.A.B. 340 (1948), 11 C.A.B. 228 (1950); Air Freight Forwarder Case, 9 C.A.B. 473 (1948); Air Freight Case, 10 C.A.B. 572 (1949).

[6] Capacity means the ton-miles by type of service (separate demands) which can be produced with given plant and equipment in *particular transport markets*. Capacity is, in part, governed by physical performance resulting from the amount and type of facilities available, but it is also governed by organization—that is, the manner in which the facilities and equipment are employed, including technique and institutional arrangements. Capacity affects direct carriers primarily, while organization affects both direct and indirect carriers.

Rates, unless otherwise indicated, will be understood to mean total charges for performing a service in a particular transport market.

[7] Present capacity and organization of privately-owned and operated regulated direct and indirect carriers developed largely from piecemeal decisions by individuals carriers subject to federal policy and regulation affecting operating authority and control. Concerted action of consequence by regulated carriers has occurred in case of the Railway Express and affects only rail and air express services. The parcel post service developed as a result of decisions by Congress and the Post Office Department. Aspects of the small-shipment problem have been considered by Congress, the ICC, CAB, and other federal agencies in a number of instances, see note 5 *supra*; but a comprehensive plan embracing all types of regulated carriers and agencies has never developed. The CAB appears to be more planning conscious than the ICC, but the scope of Board planning is limited to air services, and the technique and results are highly controversial.

the changing requirements for service.[8] As a result, there emerged imbalance in capacity and uneconomic organization. The carriers, particularly railroads, have been partially at fault.[9] Errors of omission and commission committed by regulated carriers resulting in uneconomical operation can be corrected through government regulation, however, so that the situation is principally attributable to irresolute federal action.[10]

Federal regulation has also encouraged imbalance in capacity and uneconomical organization in other ways. Present policy is ill-defined and at times vacillating, because the statutes are, in important respects, conflicting, deficient, and inflexible.[11]

[8] Technical possibilities include the development of several types of transport, each with distinct service and cost characteristics, and none of which can economically perform all small-shipment services. Additionally, there have been substantial developments in materials handling, outside the scope of this study, which, in large measure, have not been adopted by carriers in their handling of small shipments, nor have the carriers in their shipping rules and rates encouraged the adoption of these techniques by users. Further, for over a decade, there have been available statistical and programming techniques which are useful analytical tools for solving problems of allocation of this type and magnitude. Changes in the requirements for service include "hand-to-mouth" buying and frequent service, dispersion in origins and destinations in and around metropolitan areas, and decentralized production and distribution of goods typically moving as small shipments. Because the services developed without plan, small shipments have become an increasingly complex problem in industrial traffic management.

[9] Beginning in 1920, railroads (1) inherited excess railroad capacity to provide small-shipment service which has not contracted sufficiently with a shift in demand, notably to highway transport; (2) failed to maintain consistent small-shipment policies; (3) failed to agree upon co-operative action for small shipments, including maximum utilization of the Railway Express Agency; (4) failed to recognize the capabilities of highway and air transport and to incorporate these services into their organizations according to inherent advantages before regulation restricted this practice; (5) failed to develop satisfactory co-ordinated highway services with owner or controlled highway carriers; (6) refused to develop co-operative techniques formally with independent air, highway, and water carriers; (7) continued voluntarily deficit-producing less-than-carload services to retain or secure lucrative carload tonnage and to protect operating rights if, in the future, highway rights should be granted without "key point" or other restrictions; (8) belatedly, and to date restrictively, introduced trailer-on-flat car services. Criticism of railroad initiative, particularly since 1935, must be considered within the framework of federal policy and regulation governing relations between types of transport and rates. The other types of carriers, moreover, have not been zealous advocates of co-operation, particularly those with long-distance operating rights.

[10] Under existing institutional arrangements, initiative and to some extent responsibility for capacity and organization rest with the carriers, but corrective measures undertaken by firms or associations under conditions of imperfect competition are not necessarily in the public interest and must be subject to regulation in the public interest. Under present statutes, government can encourage economy and efficiency in the transport system through regulation. Further, government can and should use its coercive powers in the public interest to require economy and efficiency. *But cf.* the counsel of Commissioner Eastman concerning use of mandatory powers under regulation. *Hearings Before the Subcommittee of the Senate Committee on Interstate Commerce on S. Res. 146, Less-Than-Carload Freight Traffic and Forwarder Carload Traffic*, 76th Cong., 3d Sess. 492 (1940).

[11] Statements of congressional policy differ in their insularity, concern for particular types of transport, and emphasis upon competition. In addition, statutory provisions governing operating authority, co-operation among carriers, and unification and control of carriers are incomplete and, in important respects, inflexible and conflicting. Finally, without congressional disapproval, the ICC and the CAB failed to develop, employ, and to require satisfactory techniques for measuring "needs," "adequate service," "distinct service," "inherent advantage," and "competition," which has accentuated the problems arising from omission and conflict in the statutes. C. L. DEARING & WILFRED OWEN, NATIONAL TRANSPORTATION POLICY (1949); *Hearings Before the Subcommittee on Domestic Land and Water Transportation of the Senate Committee on Interstate and Foreign Commerce on S. Res. 50, Study of Domestic Land and Water Transportation*, 81st Cong., 2d Sess. (1950); *Hearings Before the Senate Committee on Interstate and Foreign Commerce on Bills Relative to Domestic Land and Water Transportation*, 82d Cong., 2d Sess. (1952); PRESIDENTIAL ADVISORY COMM. ON TRANSPORT POLICY AND ORGANIZATION, REVISION

The most important and continuing reason for both imbalance in capacity and uneconomic organization is that federal transport policy is in conflict with economic principle and the characteristics of the carriers and agencies. In case of railroads, restraints upon pooling, consolidation, and abandonment perpetuate excess capacity and discourage combinations which would result in economies of scale.[12] And with respect to all other types of transport and agencies, restraint upon operating authority and permitting large-scale operation appear to lessen a natural tendency toward competition.[13]

B. Results

Viewing regulation in perspective, there emerge two crucial tendencies which have profound effects upon regulated small-shipment services. First, a single type of transport tends to be employed extensively and intensively by individual carriers, with little regard to the principle of substitution.[14] The techniques adopted by, or forced

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OF FEDERAL TRANSPORTATION POLICY, A REPORT TO THE PRESIDENT (1955); *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Transportation Policy*, 84th Cong., 2d Sess. (1956); Antitrust Subcomm. of the House Comm. on the Judiciary, *The Airlines Industry*, H.R. REP. No. 1328, 85th Cong., 2d Sess. (1957).

[12] Railroad service, as a whole, is characterized by economies of scale, if not long-run decreasing cost. THOR HULTGREN, AMERICAN TRANSPORTATION IN PROSPERITY AND DEPRESSION (1948). The findings of Hultgren indicate decreasing average variable cost for United States railroads, as a whole, even at peak World War II traffic. *But cf.* Senate Comm. on Interstate and Foreign Commerce, *Rail Freight Service Costs in the Various Rate Territories of the United States*, S. DOC. No. 63, 78th Cong., 1st Sess. 48, 52, 60, 70 (1943). There is no evidence that railroad small-shipment service differs from the generalization. Restraints upon pooling and consolidation are inconsistent with the economic characteristics of railroads, although the resulting rates and services must be regulated. Competition from other types of regulated and unregulated transport has severely reduced, if not eliminated, the need closely to supervise railroad abandonment of small-shipment service. Restraint upon abandonment is imposed increasingly by state rather than federal regulation. Entry of new railroads and extension of service by railway technique should be regulated, but the problem is diminishing in importance.

[13] The economic characteristics of highway carriers do not appear to support large-scale operation. Roberts, *Some Aspects of Motor Carrier Costs: Firm Size, Efficiency, and Financial Health*, 32 LAND ECON. 228 (1956). In case of air transport, the debate over economies of scale is inconclusive. *Cf.* Koontz, *Domestic Airline Self Sufficiency*, 42 AM. ECON. REV. 103 (1952); comment by Carter, 43 *id.* at 368; and rejoinder by Koontz, *id.* at 373. Koontz argues that there are economies of scale and for consolidation; while Carter questions some of the reasoning supporting the findings, although not necessarily the recommendations for consolidation. The following are representative of the arguments against control over entry and for competition in case of service by highway and air equipment: *Hearings Before the Senate Select Committee on Small Business on ICC Administration of the Motor Carrier Act*, 84th Cong., 1st Sess. (1955); Antitrust Subcomm. of the House Comm. on the Judiciary, *The Airlines Industry*, H. REP. No. 1328, 85th Cong., 2d Sess. chs. 3, 8 (1957); WALTER ADAMS & J. B. HENDRY, TRUCKING MERGERS, CONCENTRATION, AND SMALL BUSINESS (1957); Adams, *The Role of Competition in the Regulated Industries*, 48 AM. ECON. REV. 527 (1958); Keyes, *The Protective Functions of Commission Regulation*, *id.* at 544; L. S. KEYES, FEDERAL CONTROL OVER ENTRY INTO AIR TRANSPORTATION (1951). Comparable studies of water transport and freight forwarding are not available, but the cost characteristics and theoretical argument seem to be the same.

[14] There are several types of transport which differ with respect to service and cost behavior. Further, small-shipment services usually involve several functions or tasks. If the objective is to minimize the cost of performing a particular service, these types of transport should be employed separately or together, according to the least cost combination. Substitution of one type for another to perform a particular task should occur on the basis of relative marginal cost in the short-run period of supply; and in the long-run, substitution should occur whenever the average cost of one type is less than the marginal cost of another. During the past thirty-five years, some railroad services have been preserved (or required under regulation) and, to a lesser extent, used for small shipments, when highway equipment is more economical

upon, regulated carriers and agencies have not tended to minimize cost, which would result if (1) the several types of transport and agencies were employed according to their inherent economy in performing particular functions or tasks,[15] and (2) less efficient techniques were abandoned or discouraged. Since about 1950, there have been some encouraging developments with respect to the principle of substitution within and among firms.[16] Second, total capacity in particular markets tends to be ill-adapted to changes in demand for service in the long run, although there appear to be differences in degree among the several types of transport.[17]

The result of these crucial tendencies is that the cost of performing small-shipment service in most markets is higher than it need be, in part because of uneconomical

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and provides a superior service. Similarly, a number of highway services have developed where railroad or container and flat-car service is more economical, although in some cases, the substitute service is somewhat poorer. The same may be said in the case of trailers and vessel or barge service. Local air services have been established between principal points where highway equipment is more economical and service (because of infrequent flights) is about the same. Surface express service has been forced to rely heavily upon railroad service in cases where highway equipment is more economical and expeditious. The Post Office, freight forwarders, and particularly exempt and private consolidators, have been more judicious than the others in choosing among the several types of transport, and increasingly so in recent years; but their choice is dictated by rates rather than the factor cost incurred by direct carriers in performing service.

[15] Because of historical accident, managerial discretion, and more recently public policy, services of regulated direct carriers, particularly interterminal services, are, in large measure, organized by and built around one type of transport. There is considerable controversy and mixed legal opinion about the statutes requiring the "unlike" service to be limited or auxiliary in nature, or whether the requirement is discretionary and a matter of policy with the ICC and the CAB. The controversy is reviewed in American Trucking Ass'ns v. United States, 352 U.S. 816 (1956); American President Lines, Ltd., 7 C.A.B. 799 (1947); Air Freight Forwarder Case, 9 C.A.B. 473 (1948); National Air Freight Forwarding Corp. v. CAB, 197 F.2d 384 (D.C. Cir. 1952). Under virtually the same statutory provisions, the Commission has authorized many auxiliary, a number of "key point," and a few unrestricted highway operations by railroads, but the Board has virtually precluded direct air service by surface carriers. The Board policy is the same for indirect carriers, except in case of the Railway Express which the Board treats in a special and terminable manner. The auxiliary approach may be the most economical one in some cases and should be required in such cases. The point here is that regulatory policy, if not the statutes, does not require what is economical in *each* particular case, the "exceptional" circumstances doctrine in American Trucking Ass'ns v. United States, *supra*, notwithstanding. Whether the several types of transport should be employed within a single firm or be operated by separate firms, with or without joint service, should be decided on the basis of merit, if economy and efficiency are to be the basis of policy. What has been said generally with respect to economy is also applicable to some individual firms which lawfully own or control several types of transport under limited authority.

[16] These developments include a substantial number of rail-trailer and a lesser number of ship-trailer services, a noticeable expansion of joint rail-motor rates, and a number of air and surface carrier arrangements. At this time, these developments do not appear to augur great change; rather, they appear to be selective and a continuation of the particular firm approach.

[17] During the past thirty-five years, demand for small-shipment service and capactity have both increased and changed in nature. The changes in capacity could have been accomplished through adjustments in the amount and type of capacity by existing firms, changes in the number and type of firms, or a combination of both. On the basis of available information, it is clear that (1) railroad and water capacities for performing small-shipment service have not contracted commensurate with the decline in demand for these services; (2) regulated highway and air carriers have increased less than the growth in demand for these services in some instances and more in others; (3) forwarders and consolidators have increased in number at a faster rate than demand for their services; and (4) there is concentration of capacity of all types of transport in the principal markets.

Sensitivity and precision in adjustment to change appear to be more characteristic of exempt and private than of regulated carriers and agencies. Further, regulated highway and air carriers appear to be more sensitive and to make more precise adjustments than railroads.

use of transport facilities, and in part because of excess capacity.[18] More factors of production than necessary are required to perform a given amount of service and to accommodate an increase in the amount of service. In addition, and perhaps of lesser importance to society, regulated carriers and agencies are at a disadvantage, and exempt and private carriers are encouraged.[19]

There is reason to believe that regulatory policy consistent with economic principle would alter the total number, types of carriers and agencies, and the size of firms in given transport markets.[20]

C. Suggested Policy

To mitigate the results described above, federal regulation of capacity and organization should be either intensified or relaxed.[21] Intensifying regulation might result in greater stability, but relaxing regulation is preferable as a means of lowering cost and improving the allocation of resources in transport because of the (1) economic characteristics of all but railroad carriers, which would have to be regulated;[22] (2) minimal influence of subjective matter in the administrative process of regulation; (3) stimulation given to experimentation and efficiency; and (4) opportunity for the price mechanisms to function in a manner which is more consistent with transport

[18] These diseconomies have significant effects upon the level and structure of small-shipment rates, but the diseconomies are distinct and important in themselves.

[19] Uneconomical organization and imbalance in capacity adversely affect regulated carrier service and rates, and consequently encourage private competition.

[20] To maximize use of the given capacity in the short run, firms with excess capacity should reduce rates to marginal cost (if necessary) to retain or to attract traffic. If rate reductions do not result in full utilization of capacity, firms with excess capacity should also reduce output to the point where marginal cost equals demand. Short-run rate adjustments are discussed in the next section. Short-run reductions in carrying and operating unit miles appear to have lagged behind reductions in the volume of traffic in case of rail, water, and express carriers. Short-run increases in traffic experienced by motor and air carriers appear to be accompanied by increases in carrying and operating unit miles, particularly in the case of common carriers providing regular route and scheduled service. The same seems to be true of the parcel post.

In the long run, capacity of individual carriers should be governed by equation of long-run marginal cost and demand. If existing rates are assumed, reduction in capacity by some firms should occur even under conditions of imperfect competition. If existing capacity is assumed, a reduction in rates by some firms should occur in order to attract traffic to support the capacity. Or adjustments may be made in both capacity and rates. In the long run, reduction in small-shipment capacity by railroad, water, and the express carriers has noticeably lagged behind the decline in traffic handled, while regulated highway and air carrier capacity have increased less than proportionate to traffic in some cases and more in others.

[21] Relaxing regulation here means that control over entry of new carriers and extensions in service by existing carriers would be limited to disapproval based upon fitness, willingness, and ability to serve. Elimination of particular services and abandonment would not be regulated. In case of consolidation, pooling, and joint services, control would be exercised, but limited to disapproval where cost or service is not improved. Application of antitrust legislation to these activities in transport is not recommended here if approval has been obtained from the ICC or the CAB. Intensifying regulation means eliminating exemptions, narrowing the definition of private and contract carriage, and perhaps increasing supervision over operating authority and competition generally.

[22] Regulation of railroads should continue, because they do not tend to be competitive in nature; but regulation should be relaxed somewhat to encourage economies of scale, including those which may result from mixing unlike types of transport in the same firm. Regulation of air, highway, and water capacity would be virtually eliminated, and under these circumstances, there is little reason to continue restraint upon combinations of unlike types of transport because of the amount of private transport and the ease of entry by for-hire carriers.

requirements. The last point is highly significant and requires detailed analysis, which follows.

II

DEMAND PRICING

A. Causes

Rates and charges on small shipment evolved over the years from actions by carriers, the Interstate Commerce Commission, the Civil Aeronautics Board, and Congress which affect the level of rates, rate structures, and particular rates to meet competition.[23] The weight of evidence is that rates for small shipments developed on the basis of demand for service.[24] Net revenue from demand pricing varies considerably among the several types of carriers.[25]

Demand pricing in the case of small shipments is attributable more to carrier than to market competition.[26] Allocation of common costs presents troublesome

[23] Initiative by Congress and the regulatory agencies has been most apparent with respect to prescribing maximum reasonable rate structures, while the carriers have taken the initiative in respect of the level of rates and particular rates to meet competition. In the latter case, the ICC and the CAB have intervened at times to prescribe minimum rates. More significant are the cases where proposed competitive rates are simply found to be unreasonably low or otherwise unlawful.

[24] The level of rates is governed by total cost. Since 1920, increases in operating costs principally have caused a succession of increases in the general level of rates. These increases have been applied to commodities, quantities, and lengths of haul without uniformity or apparent relation to increases in the cost of performing particular services. Small shipments have usually borne the full authorized increases. The ICC has, on dubious economic grounds, authorized petitions to increase motor-carrier rates, using the operating ratio as a guide, without using rate of return; and these petitions significantly have almost invariably followed authorized increases in railroad, water, express, and forwarder rates. Forwarder rates on individual small shipments under regulation have been, with exceptions, tied to the rates charged by direct carriers for the same services without convincing cost evidence.

In establishing the structure of rates (relationship of commodities, quantities, and lengths of haul), emphasis is placed on demand for service, although cost of service is considered. The principal objectives in rate-structure cases under regulation have been equity and the maintenance of market competition. Rates on small shipments are higher than large shipments per hundredweight because of cost and demand. The same holds true as between finished products and raw materials. There is no evidence that either average or out-of-pocket cost has been applied *systematically* in case of prescribed maximum lawful rate structures.

In cases of particular rates designed to meet competition, called permissive rates, carrier competition is clearly the dominant factor, and out-of-pocket cost usually serves as a minimum below which competitive prices may not fall. Exceptions will be noted shortly.

[25] Revenue from small-shipment services under existing rates and charges by regulated carriers ranges from out-of-pocket cost deficits to fully-allocated cost and perhaps more. Many railroads and water carriers sustain deficits, especially on individual small shipments. Motor carriers appear to incur out-of-pocket deficits on individual small shipments in the lower weight groups, but with respect to others, revenue approaches fully-allocated cost. Surface express revenues barely meet out-of-pocket cost, and parcel post revenues appear to be less than out-of-pocket cost. Earnings of the remaining carriers and agencies are similarly distributed.

[26] Demand pricing in the case of carrier competition arises from (1) differences in demand for service, (2) allocation of common and joint costs, and (3) inadequate capacity in some instances and excess capacity in others. In connection with the third point, see notes 12-13, 17, and 20 *supra*.

Market competition is involved in part in many cases, but the impetus for carriers to make rate and other adjustments is based largely upon competition among carriers and agencies to obtain or retain traffic. Decentralization of economic activity, multiple-plant operation, and inventory practices in industry appear to have stimulated carrier competition in some cases and have been the result of carrier competition in other cases; but pressure to adjust rates has come primarily from competition among

problems in both the short and long run, but imbalance in capacity, a long-run problem, appears to be the principal cause of the tendency toward and instability in demand pricing.[27] Rate competition is more pronounced among unlike than like carriers because of differences in service.[28] Rate competition and retaliation among unlike types of transport tend to be selective rather than general.[29] Conference rate-making has perhaps retarded selective rate competition, to some extent, among unlike types of transport, but federal regulation has been the more important limiting factor.

The writer agrees with others who hold that federal policy in respect of surface carriers, designedly or not, and with notable exceptions, restrains interagency compe-

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carriers for the available traffic. For an early expression of this view, see *Hearings Before the Subcommittee of the Senate Committee on Interstate Commerce on S. Res. 146, Less-Than-Carload Freight Traffic and Forwarder Carload Traffic*, 76th Cong., 3d Sess. 107-09, 117, 156, 363, 420 (1940). The importance of transport rates and services to the location and size of firms typically shipping or receiving individual and concentrated lots of small shipments, see notes 1 and 2 *supra*, is beyond the scope of this paper, but tentative findings by the writer suggest that nontransport factors are the most important.

[27] Inadequate capacity is attributable primarily to government restrictions upon operating authority, which in this case applies to highway and air transportation. See note 13 *supra*.

The reasons for excess capacity are (1) the inherent tendency for decreasing cost in the case of railroads, whose demand-oriented rates have served as the point of departure in rate competition among the several types of transport, see note 12 *supra;* and (2) oversupply of nonrailroad carriers and facilities in particular transport markets, which is in part attributable to duplication of these types of transport and services, but which in large measure results from failure to adjust the capacity and services of railroads as new types appeared (highway and to a lesser extent air carriers) or expanded (parcel post and, to a lesser extent, freight forwarders). See notes 11 and 17 *supra*.

[28] In case of rail, highway, water, and surface forwarders, prices are usually determined in conferences and published as agency tariffs under regulation. Interstate Commerce Act § 5a, 62 Stat. 472 (1948), 49 U.S.C. § 5b (1952). Railroad classifications, rules, privileges, and rates developed on the basis of demand for service. The influence of demand has been modified, but not eliminated, over the years through regulation of lawful maximum classifications and rates prescribed to achieve more uniformity and reduce unlawful discrimination. Motor carriers, water carriers, and surface forwarders became parties to railroad classifications or to agency classifications in large measure patterned after those of railroads; but by high minimum ratings and other devices, they lawfully limited themselves to certain classes of traffic. Federal regulation has modified, but not eliminated, the tendency to play "follow-the-leader." This tendency is less pronounced in the case of rate tariffs. Depending upon service advantages, water rates have been the same as, or differentially under, railroad rates, and motor-carrier rates have hovered about railroad rates. Forwarders tend to follow the small-shipment rates of the direct carriers employed.

Conference rate-making and agency tariffs are less significant in case of air freight, but air-freight charges have been in substantial degree patterned differentially under air express charges, although the practice is disappearing.

Payments made to direct carriers by the Post Office and surface and air express are not based upon tariffs, but are negotiated and regulated. Adjustments in parcel post package weights, sizes, rules, and rates are related to, if not based upon, express practices. Some motor-freight and bus package rates appear to be related to parcel post and express charges.

[29] Selective matching of prices occurs when carriers, in order to gain or retain traffic from other carriers, establish classifications, rules, privileges, or rates which are limited in application with respect to commodities, quantities, and lengths of haul. These rates, sometimes called permissive rates, are less than the prescribed lawful maximum rates and are often published on an individual carrier rather than on a conference basis. There is some tendency in selective rate-making for carriers to choose those commodities and points for which they have natural cost advantages, but the decisive factor in selection is the spread between the rate charged by the competitor and the out-of-pocket cost or average cost of the proponent. When alternative services are close substitutes, rates tend to be the same; but when they are not, there tend to be differences in rates which are supposed to reflect differences in service. Although selective matching often involves a reduction in charges, the practice is also applied when the level of rates is increased. See note 24 *supra*.

tion and tends to maintain the status quo and the existing distribution of traffic.[30] Rates which are compensatory in an absolute sense and not preferential or prejudicial to users are often found to be unreasonable and unlawful because of their effect on carrier competition.[31] The proposed rates may narrow a rate differential, equal rates of competitors, or undercut rates of competitors. In making its findings, the Commission concedes benefits to shippers, but the "threat of retaliation," "needless loss of revenue," "destruction of the rate structure," "abandonment of traditional principles of ratemaking," "national defense requirements for all types of transport," "desirability of developing and preserving all modes," "desirability of sharing the traffic," and "destructive competition" are found individually and severally to be controlling.[32] These findings have been made in some cases, even though the proposed rates met fully-allocated cost.[33]

This policy is consistent with other federal policies pertaining to the structure and perhaps the level of rates.[34] More important is the fact that under regulation,

[30] The guides for ICC rate policy are the statutory statement of policy and the statutory rule of rate-making, the latter permitting, if not requiring, demand pricing. 72 Stat. 572, 49 U.S.C.A. § 15a (Supp. 1958). Restraining competition and maintaining the distribution of traffic as matters of policy have been denied by the Commission.

The subject of interagency competitive rates and Commission policy has been the source of spirited debate in public forums and trade journals, given special study by the PRESIDENTIAL ADVISORY COMM., *op. cit. supra* note 11, and exposed to searching review by Congress. *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Transportation Policy*, 84th Cong., 2d Sess. (1956). The last source contains a wealth of factual material, discussion of Commission and court rulings, and a number of proposed changes in the rule of rate-making. See also, U.S. BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, ICC, HISTORICAL DEVELOPMENT OF TRANSPORT COORDINATION AND INTEGRATION IN THE UNITED STATES, STATEMENT 5015 (1950); *id.*, RAIL-WATER RATE ADJUSTMENTS, STATEMENT 5427 (1954); *id.*, INTERAGENCY RATE ADJUSTMENTS—RAIL AND MOTOR—STATEMENT 567 (1956).

After long hearings and debate, Congress amended the rule of rate-making in 1958 affecting surface carriers, ostensibly to prevent the Commission from holding up the rates of one type of transport to protect another, "giving due consideration to the objectives of the national transportation policy declared in this Act" (not defined). 72 Stat. 572, 49 U.S.C.A. § 15a (Supp. 1958). The results of this change on Commission policy are not yet apparent, but it is significant to note that the modifying clause has been used before by the Commission to explain its actions, and opponents of statutory change did not strenuously oppose the amendment in its final form!

[31] Proposed interagency competitive rates must not injustly prefer or prejudice shippers, places, or classes of traffic and must be compensatory—that is, something more than out-of-pocket cost. The ICC has never clearly indicated whether short- or long-run out-of-pocket cost is intended as the guide, nor how much more than out-of-pocket cost a rate should be.

[32] These terms are never defined, lack objective qualities, and are not justiciable. Similar reasoning has been followed when rates have been approved as not violating these standards!

[33] The ICC rejects the argument that cost is controlling, relying upon a never precisely interpreted statutory statement of policy. In exceptional cases, cost superiority has been found to be controlling, even though competitors were threatened with a complete loss of traffic. Langdon, *The Regulation of Competitive Business Forces: The Obstacle Race in Transportation*, 41 CORNELL L. Q. 57 (1955).

[34] The number of minimum rates prescribed is admittedly small, but the principles established in these cases have influenced carrier proposals far more than the number of minimum rates would suggest. Further, proposed competitive rates are frequently denied for being unreasonably low, without minimum rates being prescribed.

Relationships among commodities, quantities, and lengths of haul established in prescribed reasonable maximum rate structures have the cloak of legitimacy, despite elements of demand pricing. Competitive rate-making under regulation tends to destroy the prescribed maximum relationships.

Authorized increases in the level of rates to meet carrier need for revenue and reductions in some rates to meet carrier competition are not unusual simultaneous events under regulation. Unless demand for service is highly elastic, competitive rate-making has an adverse effect upon the actual level of rates.

interagency surface competitive rates will only by chance reflect relative cost of service.

The Board appears less inclined to maintain the status quo in case of competition among air carriers, both direct and indirect,[35] and not at all in case of competition between air and surface carriers.

B. Results

The results of demand pricing involve both economic and equity issues. Attention here will be limited to the economic issues. Except as there is an infinitely inelastic demand for service, which does not appear to characterize the demand for small-shipment services, demand pricing (departure from rates equal to marginal cost) results in misallocation of resources.[36] There are also derivative effects, which in case of transport include misallocating transport tasks based upon inherent advantages;[37] perpetuating excess capacity and uneconomic organization in case of regulated carriers;[38] and finally, encouraging exempt and private carriers in transport markets which are adequately supplied in varying degrees.[39]

[35] Air Freight Rate Investigation, 9 C.A.B. 340 (1948), 11 C.A.B. 228 (1950); Air Freight Tariff Agreement Case, 14 C.A.B. 424 (1951); Air Freight Rate Case, 18 C.A.B. 22 (1953).

[36] Rates above marginal cost cause a reduction in transportation service purchased for which there is effective demand, and rates below marginal cost cause an expansion in purchases of transport service beyond the added cost of furnishing it. The latter alone will cause either an increase in rates for other services to pay for deficits which result from the difference between rates and marginal cost, or a lower return to the carrier. Reduction and expansion in purchases of transport will tend to cause reduction and expansion in output and purchases of other factors of production, although the relationship of transport rates to the preceding is not direct nor in all cases crucial.

With respect to transport, rates above marginal cost result in a reduction in output and factors devoted to transport, while rates below marginal cost have the opposite effect.

In the case of railroads, which are characterized by decreasing cost, the amount of transportation purchased is larger with price discrimination than with a single price based on average cost. But the amount of service purchased will be less with price discrimination than with marginal cost pricing.

[37] As used here, inherent advantage refers to the ability of a particular type of transport, several types mingled in the same firm, or several types acting co-operatively, to produce a given service at a lower marginal cost than that of competitors. Because there are usually differences in marginal cost among competing carriers and rates are not systematically related to marginal cost, there is little reason to believe that demand pricing will result in an allocation of tasks based upon inherent advantage.

[38] Each type of transport, carrier, service, and technique tends to be perpetuated in a transport market as long as revenue is equal to or greater than out-of-pocket cost. Because small-shipment rates are based upon demand for service, competition is imperfect, and regulatory policy encourages maintenance of the status quo, the price mechanism does not eliminate excess capacity in, or force a more economical organization of, small-shipment services.

[39] Intercity private transportation, direct and indirect, is conducted primarily by large firms between principal points, and it arises because of the spread between for-hire rates and the cost of providing a given service by private means. Although regulated for-hire traffic, service, and competition are greatest in large transport markets, private carriers also operate primarily in these markets, because (1) private operations, like those of for-hire carriers, are usually most costly when they involve small lots distributed among a number of scattered places, and for-hire carriers usually have better utilization of equipment among small places; (2) regulation tends to maintain parity in rates between small and large places; (3) demand for transportation is probably higher and more inelastic between larger than smaller points, and hence demand pricing by for-hire carriers is encouraged; and (4) restrictions upon rates and upon operating authority in the case of regulated highway and air transport and freight forwarders tend to perpetuate the conditions for demand pricing by these carriers.

Whatever the motive for restraining competition among regulated carriers—protection of existing regulated carriers of all types or stability in rates and service for shippers—regulatory restraint upon all but rail transport will fail as long as private transport is not controlled arbitrarily. The reason for this assertion is the ease of entering.

Demand pricing always results in misallocation of resources and transport tasks, but the incidence and effect of demand charges are not the same when based upon market as opposed to carrier competition.[40] And in case of carrier competition, which is becoming increasingly a dominant force, there are differences in incidence and effects resulting from restrained rate competition under regulation and less restrained rate competition.[41] Less restrained rate competition would directly benefit small-shipment services, particularly the movement of concentrated lots.[42]

C. Suggested Policy

Regulatory rate policy is currently the subject of great controversy, particularly with respect to its effect upon carrier competition. Most assailants of government policy do not propose to abandon demand charging. In case of railroads, demand pricing is the only alternative if public policy is to maximize output and minimize cost of service without subsidy or government operation.[43] A defensible public policy of regulated demand pricing for railroads under conditions of long-run decreasing cost, however, is not defensible for other types of carriers and agencies characterized by constant or increasing cost. And the practice of using railroad rates, in large measure, as the point of departure for demand pricing by other types of transport is even more questionable as a price policy.

[40] Reasonable maximum rate structures prescribed for railroads and the express, and adopted wholly or partially by other carriers, incorporated demand pricing based largely on market competition; charges per unit of weight were relatively high for finished products and short hauls, and if adhered to, they would result in a particular allocation of resources and transport tasks. Demand charging based primarily upon carrier competition produces different results. What a market can pay and what it has to pay under carrier competition are not necessarily the same. Relationships among large and small markets, large and small users, substitute commodities, techniques of production and marketing, and raw materials and intermediate or finished products are involved.

[41] Rate competition is restrained under regulation, which tends to maintain the status quo. Less restrained rate competition would alter the status quo and, therefore, in some degree, the allocation of resources and transport tasks. Less restrained rate competition among types of transport has been ardently supported by railroads and proposed as a matter of law. PRESIDENTIAL ADVISORY COMM., *op. cit. supra* note 11; *Hearings, supra* note 30. See also Nelson, *Revision of National Transport Regulatory Policy*, 45 AM. ECON. REV. 910 (1955). Equally ardent opposition is expressed by highway and water carriers, which benefit under present policy. Among shippers, the proposal has received both support and opposition.

[42] The bulk of small-shipment traffic consists of manufactured goods, and carrier competition is most intense for this class of traffic. Concentrated lots of manufactured goods now pay relatively high rates compared to out-of-pocket cost and invite rate competition. Railroads particularly desire to adjust charges on concentrated lots. Charges on individual small shipments vary in relation to out-of-pocket cost, but lower rates on concentrated lots will tend to force reductions in rates on individual small shipments in cases where there is a large spread between rates and out-of-pocket cost. Motor carrier traffic will be adversely affected by these reductions on all but very small packages and short hauls. Regulated, exempt, and private forwarders will benefit if the spread in rates between individual small shipments and concentrated lots increases.

[43] There is some support in case of decreasing cost for marginal (out-of-pocket) cost pricing of individual services and payment of the deficit by government through subsidy or direct operation. Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 ECONOMETRICA 242 (1938). Conceding that marginal cost pricing results in the greatest output and the best allocation of resources in transport, subsidy from taxation is objectionable, because there is no necessary relationship between transport benefits and taxes. Limited demand pricing is accepted generally, and is condoned here as a lesser evil to prevent subsidy and to preserve private ownership and operation in case of industries of decreasing cost.

An alternative to present rate policy under regulation is to establish rates in proportion to differences in the level of marginal costs.[44] Preservation of differences in marginal cost in competitive rate-making would result in a better allocation of resources than present rate policy. This alternative, however, would not tend to eliminate excess capacity, minimize factors devoted to transport, nor result in rates closely related to the cost of performing particular services.

A more radical alternative, supported here, is to permit less restrained rate competition. Regulatory agencies would establish reasonable maximum and minimum rates, carrier competition would determine the actual rate, and carriers would be accountable for personal discrimination and unjust preference and advantage. Proponents argue that less restrained rate competition will be more likely to result in rates based upon relative cost of service.[45] The reasons for this position are that (1) competitive rate-making will result in some redistribution of traffic; (2) rates on noncompetitive traffic need not increase; (3) reductions in competitive rates need not cause reductions in net revenue; (4) redistribution of traffic need not result in rate increases by losing carriers; and (5) reduction in competition need not result in rate increases.

1. *Competitive rate-making will result in some redistribution of traffic*

Competitive rate-making will, to some extent, redistribute existing traffic and alter the rate of growth among the several types of transport, because there is some substitutability among carriers and agencies. Redistribution of traffic alone is not against the public interest.

2. *Rates on noncompetitive traffic need not increase*

Rates on noncompetitive traffic in many cases already approach prescribed reasonable maximum rates, if not what the traffic will bear.[46] Further, the Commission and the Board would still be empowered to protect users upon a finding that the differences between competitive and noncompetitive rates were unreasonable and unjust.

[44] Extended discussion of this idea with Dr. J. R. Rose has been most helpful.

[45] See note 41 *supra*. Present regulatory policy tends to maintain the status quo, a policy which only by chance will result in rates related to relative cost of service, particularly in the case of small-shipment services. More rate competition will encourage each of the several types of transport, if not individual carriers, to seek existing traffic and to develop new traffic for which they are inherently suited. In this connection, see also Pegrum, *The Special Problem of Inter-Agency Competition in Transport*, 24 ICC PRAC. J. 307 (1956); H. Koontz, *Transportation Freedom for National Defense*, a reprint of an address before the Eleventh Convention of National Transportation Association, Salt Lake City, Utah, Oct. 15, 1956.

[46] The concept of a reasonable rate should be given greater precision whether competitive pricing is allowed or not. No rate should be greater than average nor less than marginal (out-of-pocket) cost. Fully-allocated cost, exclusive of common costs and deficits attending other services (*e.g.*, passenger service) has been suggested as the lower limit for a prescribed maximum rate. *Cf.* PRESIDENTIAL ADVISORY COMM., *op. cit. supra* note 11, at 11. If this latter suggestion is followed in practice, and fully-allocated cost less deficits is well above many currently prescribed maximum rates, rates on noncompetitive traffic could be increased, market competition permitting, and rates on competitive traffic reduced. In a limited sense, the issue is simply, whose ox is gored? The economic effects of increasing rates or raw materials traffic, however, would probably not be offset by the effects of reducing rates on finished products, because transport rates tend to be pyramided and become cumulative in the production and marketing processes.

In addition, the type and amount of traffic not subject to carrier or market competition is relatively small, raw materials included, and growing private carrier and market competition act as further deterrents to rate increases. Finally, if there are increasing returns from rate reductions on competitive traffic, there will be less need to increase rates on noncompetitive traffic.

3. *Reductions in competitive rates need not cause reductions in net revenue*

The effect on net revenue from reductions in competitive rates hinges upon elasticity of demand for service. There is little evidence to indicate that demand for transport service is relatively inelastic; and if, as volume increases, the reduction in rates is less than proportionate to the reduction in average unit and marginal cost, increasing returns will occur. Net revenue for the carrier(s) reducing rates will increase, not decrease. In addition, with a larger volume of traffic, quality of service may improve and thereby stimulate demand for service, for techniques of operation differ as between small and large volumes of traffic. Further, added traffic may, in some cases, also result in economies of scale.[47]

4. *Redistribution of traffic need not result in rate increases by losing carriers*

Gains accruing to certain carriers and users from reduced rates may be partially offset by losses suffered by other carriers and users through net reductions in traffic and consequent increases in cost and rates. The possibility is remote and, therefore, relatively unimportant for two reasons. First, with respect to users, carriers losing traffic will be deterred from increasing rates on remaining traffic, because the volume of captive traffic is not large, and in most cases, regulated carrier services may be substituted one for another at some price above the out-of-pocket cost of the low cost carrier. Private carrier and market competition are also deterring factors.

Second, carriers characterized by constant or increasing cost will be reduced in number as traffic declines, but average and marginal cost will not increase.[48] Rates, therefore, need not be increased. Only in the case of railroads will net losses in traffic result in higher long-run average and marginal cost, and there is nothing to indicate that railroads will sustain net losses in traffic under less restrained rate competition.[49]

[47] Observations made in this paragraph are particularly relevant to railroads, which are at present outspoken proponents of competitive pricing. Railroads are clearly underutilized, and it is doubtful if many of them have achieved the most economical size. Many of their proposed competitive rates are designed to regain traffic lost to competitors. It is also significant to note that railroads urge, correctly in principle, that compensatory user charges be levied on publicly-owned air, highway, and water facilities. These charges would tend to reduce private competition and force for-hire carriers to charge rates which reflect total cost to society of producing service, again increasing potential traffic for railroads. Railroads also urge freedom to operate other types of transport without restraint in order to use the most economical machinery for each task. As stated repeatedly in this article, the basis for decision in these matters should be economy and efficiency, not aid to railroads or preservation of the status quo.

[48] See notes 12, 13, 17, and 20 *supra*.

[49] Railroad pressure for more freedom to conduct highway operations, tightening of the definition of for-hire carriers, and user charges should be kept in mind.

5. *Reduction in competition need not result in rate increases*

Carrier competition eventually may be reduced, or in some cases eliminated, and there is understandable fear by users of future increases in rates or deterioration in service with the same rates. Balanced against this possibility are (a) regulatory powers to control maximum reasonable rates; (b) the constant threat of market competition and the reappearance of for-hire and private carrier competition, particularly highway transport;[50] and (c) changes in the attitude of for-hire management toward its responsibilities under a new institutional arrangement. Emotions and experience differ, but the third point gives least promise. Regulatory agencies can prevent unreasonable rate increases and will protect the public if the public demands effective regulation.

[50] It is conceded that there may be a range within which rates might move without competition, for the threat of rate reductions to drive out competition will increase the risk for competitors and thus their costs and rates. The risk would not make competition prohibitive, except in the case of new railroads.

THE AGRICULTURAL EXEMPTIONS IN INTERSTATE TRUCKING: MEND THEM OR END THEM?*

Clem C. Linnenberg, Jr.†

I

The Objectives of Control

For the lawyer or social scientist interested in the governmental regulation of transportation, it is economic control—not safety regulation—that either warms the cockles of his heart or sends his blood pressure to a dangerous level. Safety regulation means control by public authority as to types of brakes, the maximum number of hours that a truck driver or locomotive engineer may stay at the controls without being relieved, and so on. To oppose such regulation is as hazardous as frowning at Mother's Day; but reasonable men can and do differ as to what measures are appropriate to the objective. In the area of economic regulation, however, reasonable men are not even united on the objectives. Such regulation means control over entry into the business, control as to routes or areas served, control as to rates, and the like. Unless noted otherwise, "control" in this article refers only to economic control.

In this country's earlier ventures in the control, by government, of transportation, protection was sought for shippers and receivers, for investors, and for carriers against each other. This last meant chiefly that railroads were not to be allowed to destroy each other through competition that reflected the consequences of overhead costs and joint costs.

In recent decades, there has been a considerable accent on the regulation of one group of carriers to protect another. The Motor Carrier Act of 1935[1] (part II of the Interstate Commerce Act) brought a large segment of interstate truck and bus operations under economic control by the Interstate Commerce Commission, along lines somewhat similar to the economic control which the federal government had evolved for railroads during a half-century. The railroads' friends rejoiced that the motor carriers thus regulated would no longer be able to subject the railroads to a species of competition in which the railroads had been restrained by public authority and the interstate trucks and buses had not.

Common and contract carriers by highway both provide transportation on a for-hire basis. That is, they exist in order to haul for others—the common carrier

* The views expressed in this article are those of the author, and do not necessarily reflect the views of any government agency.

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[1] 49 Stat. 543, 49 U.S.C. §§ 301-27 (1952).

for all who seek its service, and the contract carrier for a quite limited number of shippers, even as few as one. But the most eloquent reason advanced for the public control of contract carriers is not that their customers need protection from them or that the contract carriers need to be protected against each other, but that unrestrained competition on their part would be disastrous to common carriers.

Between the Association of American Railroads and the American Trucking Associations, Inc., there is a deep cleavage on some basic issues of public policy regarding transport. But they speak as with one voice on the desirability of substantial curtailment of the agricultural-commodities exemption in interstate trucking—the statutory provision whereby the interstate, for-hire trucking of numerous commodities, coming directly or indirectly from the farm, is free of economic control by the federal government. Both organizations want protection for their members, through the extension of economic control to this uncontrolled segment of the transport industry.

So far as safety regulation is concerned, the Interstate Commerce Act gives to the ICC almost as full authority over the operators of exempt, for-hire motor vehicles (whether agricultural haulers or others) as over the motor carriers subject to economic control. The only disparity concerns insurance.[2] On the nonexempt motor carriers, the ICC can impose (a) requirements as to insurance covering personal injury to passengers and damage to cargo, which is a form of economic regulation,[3] as it deals with quality of service; and also (b) requirements as to insurance covering personal injury or property damage to others (such as motorists), which is a form of safety regulation. Exempt carriers are free of both.

The agricultural-commodities exemption has become a strange amalgam. Certainly this character has been achieved at least in part by amendment. There are critics who would say that judicial interpretation is likewise responsible. At all events, it is impossible to understand the proposals for changing the exemption, or the complications inherent in any attempt at such change, without knowing the origin and history of this and the other agricultural exemptions.

II

ORIGIN OF THE AGRICULTURAL-COMMODITIES EXEMPTION

In 1935, when a proposal was made to regulate interstate truck and bus transportation, the Senate—traditional friend of the farmer—passed a bill in which there were some exemptions from economic regulation, but no exemption which referred to farmers or their products or farmers' trucks.[4] This was done despite a protest by various farm organizations—the American Farm Bureau Federation, the National Grange, and others—that such a law would increase truck rates, impair the flexibility

[2] 49 Stat. 557 (1935), as amended, 49 U.S.C. § 315 (Supp. V, 1958).
[3] See D. PHILIP LOCKLIN, ECONOMICS OF TRANSPORTATION 699 (1954).
[4] S. 1629, 74th Cong., 1st Sess. (1935).

of highway transportation, "impose rigid and extreme regulation" upon truckers, and "squeeze out" the small truckers.[5]

The bill, as reported to the House of Representatives by its Committee on Interstate and Foreign Commerce, however, contained an exemption from economic regulation, as regards "motor vehicles used exclusively in carrying livestock or unprocessed agricultural products"—unless and until the ICC should find that such regulation was necessary to carry out the policy of Congress enunciated in the bill.[6] Nevertheless, the House debate on the bill and how to temper it to the shorn farmer was extensive. One member, declining to support the bill at all, declared that ". . . the influences behind this measure are centered largely amongst the railways, both the officials of the railroad companies and the members of the railway labor unions." The railroads, he indicated, hoped that the bill would reduce the number of trucks competing with railroads and raise the rates of those that survived.[7] Another member called the bill "simply a move in restraint of trade."[8] Another, opposing any economic regulation of trucks and buses, and identifying himself as a farmer, said, "The only relief I have ever seen in my 40 years on that farm from the terrific confiscatory railroad freight rates was when the trucks came."[9] In contrast, Mr. Rayburn, of Texas, said that ". . . this bill, in the regulation of matters in interstate commerce does not go as far as many of the states have gone in regulating matters of transportation by bus and truck in intrastate commerce, regulations that have been accepted from one end of the land to the other. . . ."[10]

The House debate concerned not only the merits or faults of the general idea of economic regulation of motor carriers. It also dealt with the adequacy of the agricultural exemption embodied in the bill as reported out by the House Committee. In particular, concern was voiced as to whether "unprocessed agricultural products" was a broad enough phrase to include pasteurized milk and ginned cotton. As one member remarked, ". . . ginning is sometimes synonymous with processing."[11] A member of the Committee on Interstate and Foreign Commerce declared, "I imagine the courts may be called upon at some time to interpret that, but it is not for us at this time to go into a lengthy discussion, trying to define all agricultural products which are unprocessed. They would run into the thousands."[12] Nevertheless, perplexity persisted; and the House changed the phrase from "unprocessed agricultural products" to "agricultural commodities (not including manufactured products thereof)."[13] The word "livestock," put by the reporting House Committee into the exemption without qualification, was accepted by the House. Without dis-

[5] 79 CONG. REC. 5733 (1935).
[6] *Id.* at 12219.
[7] *Id.* at 12197.
[8] *Id.* at 12214.
[9] *Id.* at 12216.
[10] *Id.* at 12204.
[11] *Id.* at 12220.
[12] *Id.* at 12205.
[13] *Id.* at 12220.

cussion, the House added "fish (including shellfish)" to the same clause, on the motion of the Chairman of the Committee on Merchant Marine and Fisheries.[14]

The net result was section 203(b)(6) of the Interstate Commerce Act, an exemption (from economic regulation) of "motor vehicles used exclusively in carrying livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof)."[15] The House also insisted upon removing the authorization for the ICC to set this agricultural-commodities exemption aside.[16]

III

ORIGIN OF THE OTHER AGRICULTURAL EXEMPTIONS

A considerable amount of the House debate expressed a determination not to have the government interfere with farmers' hauling their own crops to market in their own trucks and hauling supplies and equipment back to the farm. As regards *all* private trucking, by farmers or others—the trucking of one's own property, in contrast to trucking for-hire—the bill extended only to safety regulation.[17] Furthermore, all provisions of the bill—economic and safety regulation alike—were expressly limited to interstate and international trucking (grouped together in this article under the phrase "interstate"). The interstate trucking that is of greatest concern to a farmer is not likely to be the use of his own truck. However, in addition to the omission of *all* private trucking from the bill's provisions for economic regulation, the House inserted a superfluous exemption of private trucking by a farmer, to and from his farm—section 203(b)(4a) of the Interstate Commerce Act.[18]

Of much more practical import was the lively concern shown for the trucking operations of farmer co-operatives. Here the dominant question was not the co-operatives' hauling of their own members' products and supplies, but the hauling of *nonmembers'* products and supplies. Under the Agricultural Marketing Act of 1929, as amended, farmer co-operatives dealing in farm products, farm supplies, or "farm business services" were, at the time of the 1935 debate in the House regarding the agricultural exemptions, already allowed certain benefits (including eligibility for Government-sponsored loans), even if the value of such business transacted with or for nonmembers were as great as (but not in excess of) the value of such business transacted with or for members.[19] A part of the business of these co-operatives was the trucking of farm products from the farm and supplies to the farm. Trucking for nonmembers was a portion of the nonmember business that entered into the reckoning as to whether the co-operative was staying within the fifty per cent limit.

[14] *Ibid.*

[15] 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(6) (1952).

[16] 79 CONG. REC. 12226 (1935).

[17] 49 Stat. 546 (1935), 49 U.S.C. § 304(a)(3) (1952).

[18] 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(4a) (1952).

[19] That Act's definition of "cooperative association" (which includes the 50 per cent ceiling on nonmember business) is § 15(a), 46 Stat. 11, as amended, 12 U.S.C. § 1141j(a) (1952). Congress amended this definition by means of 49 Stat. 317 (1935), a few weeks before the House debate on the proposed Motor Carrier Act; and that version of the definition was still unchanged when the Eighty-fifth Congress expired on Jan. 3, 1959.

During the debate in the House regarding the motor-carrier bill, an exemption from the bill's provisions for economic regulation was proposed for "motor vehicles controlled and operated by a co-operative association as defined in the Agricultural Marketing Act" of 1929.[20] The amendment simply preserved a right already enjoyed by the agricultural co-operatives. The amendment's sponsor stated that the reasons for his amendment were: (a) in some instances, hauling for nonmembers reduces the expenses of hauling for members; and (b) some farmers, nonmembers of the co-operative, would be left entirely without transportation if the co-operative were not allowed to haul for them.[21] His amendment was adopted, and became section 203(b)(4b), now section 203(b)(5), of the Interstate Commerce Act.[22]

The Senate accepted sections 203(b)(4a), (4b), and (6) of the Interstate Commerce Act as added by the House. They provided exemption (from economic regulation) for:

(4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or
(4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or . . .
(6) motor vehicles used exclusively in carrying livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof); . . . .

IV

SCOPE AND ANTICIPATED IMPACT

Thus, the Motor Carrier Act of 1935 went on the books with two agricultural exemptions covering both farm products and farm supplies, and an agricultural-commodities exemption. Of the three, it is this last that has, in the years since 1935, been most commonly heard of in the courts, in Congress, and in the sundry journals which, in a practical or a scholarly way, are concerned with transportation.

On its face, section 203(b)(6) of the Interstate Commerce Act, as originally enacted and, indeed, as amended prior to the Transportation Act of 1958,[23] seems to run in terms of the nature of what is hauled—not the country where it was produced, or who hauls it, or from what sort of origin, or to what sort of destination, or how far, or for what purpose. As for the commodities covered by this exemption, in 1935, *all* agricultural commodities were included, but with no definition except the negative device of excluding products *manufactured from* agricultural commodities. Somewhere between the cotton gin and the shirt factory, a line was to be drawn by interpretation. Livestock was included, but meats were not named in the exemption. Fish was listed, but with no clue, in the statute or the debate, as to whether they must be alive or dead, whole or sliced, raw or cooked. In this article and in such discussions generally, "the agricultural-commodities exemption" means

[20] 79 CONG. REC. 12218 (1935).
[21] *Ibid.*
[22] 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(5) (1952).
[23] 72 Stat. 568 (codified in scattered sections of 49 U.S.C.).

all of section 203(b)(6) of the Interstate Commerce Act, including the fish, despite the fact that they are neither a field crop nor a ranch product. "The agricultural exemptions" means this provision plus the two for trucking by farmers and farmer co-operatives.

The regulatory scheme to which sections 203(b)(4a), (4b), and (6) of the Interstate Commerce Act were enacted as exceptions is, as noted above, solely the regulation of interstate and foreign commerce. Unlike the ICC's role in railroad regulation during the past half-century, its role in the regulation of motor carriers expressly excludes, by the statute's own terms, any jurisdiction over intrastate operations. This judgment of Solomon applies even if the business of a single run consists partly of interstate traffic and partly of intrastate traffic in a half-dozen states.

The extensive debate in the House which produced these exemptions reflected a keen desire to provide the farmer with inexpensive, convenient transportation. In the House, the only opponents of these exemptions, in any sense, were members who apparently believed that the exemptions' purposes could be achieved by the bill as reported to the House by its Committee on Interstate and Foreign Commerce. These members and the exemptions' proponents had one thing in common, however: silence as to whether the exemptions would substantially preclude attainment of whatever objectives the Motor Carrier Act had; or whether economic regulation of the transportation covered by sections 203(b)(4b) and (6) of the Interstate Commerce Act might be beneficial or harmful to the exempted trucking firms involved, to their employees, to the competing regulated firms (whether motor carriers or others), or to their employees.

In a different but somewhat related way, Congress has shown its concern for the farmer's stake in transportation by provisions authorizing and directing the Secretary of Agriculture to make complaint or petition to the ICC, the Federal Maritime Board, the Civil Aeronautics Board, and "other Federal or State transportation regulatory" bodies as to transportation charges, practices, and services relating to farm products and supplies.[24] The Secretary of Agriculture is represented in numerous proceedings before such bodies and also in transportation-regulation cases when they reach the courts. The matters involved include the issue of whether a given trucker who wishes to haul certain commodities for-hire can do so under the agricultural-commodities exemption or whether, instead, he must get ICC operating authority.

The pattern of motor-carrier regulation differs substantially between the federal and the state governments and among the latter. The same may be said as to the pattern of agricultural exemptions. Such exemptions are by no means universal among the states; and those exemptions that exist are of widely divergent types.[25]

[24] Agricultural Adjustment Act of 1938, § 201, 52 Stat. 35, 7 U.S.C. § 1291 (1952); Agricultural Marketing Act of 1946, § 203(j), 60 Stat. 1087, 7 U.S.C. § 1622(j) (1952).

[25] *Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce on Problems of the Railroads*, 85th Cong., 2d Sess., pt. 3, at 1856-57 (1958).

Moreover, those states without agricultural exemptions differ greatly in the diligence with which they enforce the authority that they theoretically wield.

V

EXEMPTIONS ALL 'ROUND

The agricultural exemptions from the economic regulation of trucking are far from unique, even if we limit our horizon to the federal jurisdiction in contrast to that of the states, and to highway transportation as distinguished from the other modes of transport. As it now stands, section 203(b) of the Interstate Commerce Act sets out the three agricultural exemptions plus a wide assortment of others, including one for interstate taxicabs (such as those plying between downtown Washington, D. C., and its extensive suburbs in Maryland and Virginia) and one for "motor vehicles used exclusively in the distribution of newspapers" (an aspect of transportation which likewise has its greatest importance where big cities are located near a state boundary).[26]

Despite the lack of anything resembling exact information as to the number of ton-miles or passenger-miles hauled by motor vehicle under the Interstate Commerce Act's sundry exemptions from economic regulation, it would probably be correct to say that the three agricultural exemptions combined, or perhaps the agricultural-commodities exemption alone, accounts for more transportation than any other single exemption in section 203(b) of the Interstate Commerce Act. Certainly the exemptions under sections 203(b)(5) and (6) (farmer co-operatives' trucking, and commercial trucking of agricultural commodities) of the Act are outstanding in terms of the volume of traffic which moves in competition with regulated transportation.

The Interstate Commerce Act's part III, added in 1940, provides for ICC economic regulation of common and contract carriers by water, with respect to transportation provided by them in interstate commerce and (in some circumstances) in the domestic part of movements in foreign commerce. From this control, there is an exemption for the transportation of commodities in bulk (*e.g.*, wheat, coal, and phosphate rock) when the cargo space in the vessel or barge tow—a string of barges, towed as a unit—carries no more than three such commodities. The statute further limits this exemption in such a way that it does not apply in equal degree to (a) transportation on rivers, canals, etc., and (b) coastwise and Great Lakes shipping; and it does not apply at all to (c) intercoastal movements via the Panama Canal. From the ICC's jurisdiction under part III, there is also an exemption for "liquid cargoes in bulk in tank vessels," with no distinction as to the waterway or body of water involved; and there are still other exemptions, some of them conditional upon the ICC's consent.[27] Some years ago it was estimated that ". . . the water carriers

[26] 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(2) and (7) (1952).

[27] 54 Stat. 931 (1940), as amended, 49 U.S.C. § 903 (1952). See also 54 Stat. 950 (1940), 49 U.S.C. § 920(a) (1952).

subject to the Interstate Commerce Act transport only about 10 percent of all water tonnage."[28]

Under the Shipping Act, the Federal Maritime Board's powers as to rates, discriminatory practices, and the like apply to common carriers by water in foreign commerce, but not to contract carriers.[29] The Civil Aeronautics Board's powers of economic control over interstate and foreign air transportation and over the air transportation of mail are likewise limited to common-carrier operations. Moreover, the CAB is authorized to grant, to individual common carriers by air or to classes of such carriers, exemption from most aspects of economic regulation.[30] None of these exemptions from economic control by the ICC, FMB, and CAB is accompanied by statutory exemption from federal safety regulation.

VI

RELATED ISSUES OF FEDERAL ECONOMIC CONTROL OF TRUCKING

To understand the economic role of the agricultural-commodities exemption and the legislative battles regarding it, we need to consider, at least briefly, several aspects of the Interstate Commerce Act's part II that dovetail with it. First, the ICC's authority over *private* trucking—transportation not performed for compensation, which usually means that the carrier and the owner of the cargo are the same person—is limited to safety regulation.[31] It may be asked, "How could it be otherwise?" Truly enough, a man does not charge himself rates or render himself a quality of service about which he might conceivably protest to a helpful commission. But whether he engages in transportation at all, even of his own goods, may be subject to a governmental power to loose and to bind. During World War II, there were proposals to prohibit all trucking beyond a specified distance, whether the hauling were private or for-hire. In more recent years, the for-hire segment of the transportation industry, including both motor-carrier and railroad interests, have demanded that private trucking be reduced to what is "legitimate"—the all-round, handy adjective of almost any businessman to distinguish himself from his least admired rivals. As recently as 1958, Congress heeded this complaint with a tightening up of the Interstate Commerce Act's definition of private trucking.[32] But despite frequent complaints that much of what passes as private trucking—*e.g.*, in "buy and sell" operations—is for-hire trucking in disguise, this topic of controversy causes less noise than the agricultural-commodities exemption. The exemption for the farmer cooperatives' trucks also evokes little criticism.

From 1940 until 1957, a "contract carrier by motor vehicle" was defined by the Interstate Commerce Act as "any person which, under individual contracts or agree-

[28] 60 ICC ANN. REP. 36 (1946).

[29] 39 Stat. 733 (1916), as amended, 46 U.S.C. §§ 812-18 (1952). See also 39 Stat. 728 (1916), as amended, 46 U.S.C. § 801 (1952).

[30] 72 Stat. 737, 754-71, 49 U.S.C.A. §§ 1301(3), (10), (19), (21), and 1371-86 (Supp. 1958).

[31] 49 Stat. 544 (1935), as amended, 49 U.S.C. §§ 303(a)(14), (15), (17), 304(a)(3) (Supp. V, 1958).

[32] 72 Stat. 574, 49 U.S.C.A. § 303(c) (Supp. 1958).

ments, engages in the transportation . . . by motor vehicle of passengers or property . . . for compensation" but which, unlike a common carrier, does not hold itself out to the general public to engage in such transportation.[33] Customarily, a motor contract carrier serves a very few shippers—perhaps only one; is even likelier than a motor common carrier to be specialized as to the commodities it hauls or the character of the service it renders; and sometimes functions as so integral a part of a shipper firm served by it that the trucks bear the name and distinctive color scheme of the shipper. The railroads are described by themselves and their friends as the backbone of the nation's transportation system; and the motor common carriers are happy to adopt this description, without depriving the railroads of it, when they join the latter in demands to keep the contract truckers within "proper" bounds. A statute approved by the President in August 1957 tightened the above definition by transmuting custom into law. Transportation by a contract carrier is required to be, for example, "under continuing contracts with one person or a limited number of persons."[34]

At about the same time, Congress satisfied another long-standing complaint by common carriers against contract truckers. Each contract trucker had been required to publish the minimum rates actually charged by it for each part of the transportation service rendered by it. Because the common carriers did not know the actual rates charged to any shipper other than the one benefiting by the lowest rate, it was said that they could not compete effectively. A statute of August 1957 requires each contract carrier by motor vehicle to publish *all* of its actual rates.[35]

Trip-leasing is a practice that strengthens private trucking and exempt for-hire trucking. Legal restrictions on it, therefore, find considerable support among regulated for-hire truckers. Trip-leasing is the leasing of a motor vehicle—and, ordinarily, the supplying of a driver as well—for a single one-way trip per lease. Generally, the lessor is a firm—one-man or larger in scale—engaged in private trucking or in exempt for-hire trucking, and having nothing to haul on the return trip. This is quite likely to happen, for example, in the trucking of fresh fruits and vegetables from Florida to the North. There are regulated for-hire truckers with traffic unbalanced in the opposite direction. They, therefore, are glad to be lessees of some equipment to meet part of their needs. The owners of the equipment welcome an arrangement that cuts down their net expenses on the return journey, or even yields them a net return above their out-of-pocket expenses or above the fully distributed costs of the return journey. This is a complementing of functions that, to persons intent on the over-all efficiency of the economy, has a strong appeal.

The ICC, in recent years, issued, but repeatedly postponed, regulations limiting to a minimum of thirty days the lease of a motortruck for use by a regulated interstate trucker and prohibiting the fixing of compensation to the lessor as a percentage of the lessee's revenue from use of the vehicle—the prevailing manner of fixing such

[33] 54 Stat. 920 (1940), 49 U.S.C. § 303(a)(15) (1952).
[34] 71 Stat. 411 (1957), 49 U.S.C. § 303(a)(15) (Supp. V, 1958).
[35] 71 Stat. 343 (1957), 49 U.S.C. § 318(a) (Supp. V, 1958).

compensation. A trip-lease journey usually is completed in far less than thirty days. The ICC said that these restrictions were necessary chiefly to make its enforcement of safety regulations effective. Indeed, if the ICC is correct in saying that truckers under the agricultural-commodities exemption have an outstandingly bad safety record, then anything that tends to make it impossible for exempt haulers to operate is a boost to safety.

Farm groups denied that this restriction on agricultural haulers was needed for safety reasons. The Interstate Commerce Act, as it stood, was deemed by the ICC to be an adequate basis for the Commission's intended restriction on trip-leasing. Eventually, after considerable controversy outside of Congress, the latter body enacted a remarkably complex amendment[36] to the Interstate Commerce Act, narrowing the ICC's authority to restrict trip-leasing; and the Commission promptly issued a regulation utilizing to the full its pruned-back powers in this area.[37] The amendment forbade the ICC to control the duration of lease of a "motor vehicle, with driver, or the amount of compensation to be paid" the lessor in certain situations involving trucks operating under the Interstate Commerce Act's section 203(a)(17) (private trucks)[38] or under its sections 203(b)(4a) or (5) or (6) (farmers' trucks, farmer co-operatives' trucks, and for-hire trucks under the agricultural-commodities exemption). For the last-named of these four categories of trucks, the ICC was forbidden to impose the specified types of restriction where the vehicle to be leased to a regulated interstate trucker has completed the hauling of a load within the agricultural-commodities exemption and is to be used by the regulated carrier "in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based."[39] This can be illustrated by reference to a man who has his residence in Florida, owns one truck, and hauls Florida produce northward. As an exempt trucker, he may move a load of fresh cabbage from Florida to New York City; there lease his truck, to be driven by himself, to a motor common carrier engaged in the hauling of "general commodities"; proceed with his empty truck to Newark, New Jersey; there pick up part of a load of merchandise; go to Philadelphia and complete his load of merchandise; thence drive to Atlanta; there deliver the load and thus fully carry out the lease agreement; and then proceed with an empty truck—again on his own—to a Florida cabbage-growing area and try to get another load of cabbage. During the few days of the movement from New York City to Newark to Philadelphia to Atlanta, his vehicle is utilized by the regulated carrier, and the ICC is forbidden to keep him from entering into this arrangement or to control the amount he is paid by that carrier for the services of his truck plus himself.

[36] 70 Stat. 983 (1956), adding subsections 204(e) and (f) to the Interstate Commerce Act, as amended, 49 U.S.C. § 304(e) and (f) (Supp. V, 1958).

[37] 49 C.F.R. § 207 (Cum. Pocket Supp. 1959).

[38] 49 Stat. 544 (1935), 49 U.S.C. § 303(a)(17) (1952).

[39] 70 Stat. 983 (1956), 49 U.S.C. § 304(f)(2) (Supp. V, 1958).

VII

THE AGRICULTURAL EXEMPTIONS' LEGISLATIVE HISTORY

A. Measures Tending to Broaden the Exemptions

In the legislative history of the agricultural exemptions between 1935 and 1958, what Congress omitted doing—after varying degrees of attention to numerous proposals—was more important than what it did. The ICC early enunciated what came to be known as the "poisoned vehicle" doctrine.[40] This meant that if any truck operating under section 203(b)(6) of the Interstate Commerce Act hauled any non-agricultural commodity at any time, all subsequent interstate transportation by that truck would be subject to economic regulation by the ICC. Indeed, the agricultural-commodities exemption as originally enacted did refer to "motor vehicles used exclusively in carrying livestock, fish . . . , or agricultural commodities. . . ." During the debate in the House in 1935, Mr. Gilchrist offered an amendment which would have substituted "primarily" for "exclusively." He warned the House of the danger in the latter word, but his amendment was rejected as needless.[41]

In 1938, in response to the ICC's poisoned-vehicle doctrine, Congress amended section 203(b)(6) of the Interstate Commerce Act as follows:[42]

> (6) motor vehicles used [exclusively] in carrying *property consisting of* livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof), *if such motor vehicles are not used in carrying any other property, or passengers, for compensation* . . . .

On its face, the language was still ambiguous as to whether "not used" meant "not used at the same time."

In 1940, each of the three agricultural exemptions was amended. In section 203(b)(6), "livestock" was qualified by "ordinary"; to section 203(b)(5), federations of farmer co-operatives were added, with the same restrictions as those already applied to the co-operatives themselves; and in section 203(b)(4a), "and used" was changed to "when used"—an effort at clarifying the matter of *when* a farm truck was to be exempt from economic regulation.[43] In response to ICC rulings that "agricultural" does not include "horticultural," Congress in 1952 inserted the phrase "(including horticultural)" after the word "agricultural" in sections 203(b)(4a) and (6).[44]

The net result of these changes was that on the eve of the Transportation Act of 1958, the agricultural exemptions applied to the following:

> (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved

[40] See Williams Contract Carrier Application, 2 M.C.C. 685 (1937).

[41] 79 CONG. REC. 12227 (1935).

[42] 52 Stat. 1237 (1938) (word in brackets was deleted; those in italics were added).

[43] 54 Stat. 919-20 (1940).

[44] 66 Stat. 479 (1952).

June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation. . . .

On the whole, the amendments enacted before the Transportation Act of 1958 were intended to broaden the exemptions, by comparison with the original phrasing or an ICC interpretation.[45] The only *unsuccessful* bills in Congress for broadening the exemptions have been the initial attempt to spell out that horticultural commodities are included in sections 203(b)(4a) and (6) of the Interstate Commerce Act;[46] the attempt to add "butter"[47] and "fertilizer and fertilizer materials"[48] to section 203(b)(6) of the Act (the latter being an extension to farm *supplies*); and a provision that would have expressly included in the latter section "fish or shellfish, and fresh or frozen products thereof *containing seafood as the basic ingredient,* whether breaded, cooked or otherwise prepared . . . ."[49]

B. The Farm-to-First-Market Idea

Of the various unsuccessful attempts to amend the agricultural-commodities exemption, the usual ones have been efforts at narrowing it. The proposal behaving most like King Charles's head has been that of limiting this exemption to the movement from farm to first market. Such a restriction on the exemption has been advocated by the ICC for at least twenty years. The ICC or its legislative committee made farm-to-first-market proposals to Congress in 1939, 1940, 1952 (twice), 1955, 1956, and 1957.[50] None of these was enacted; but the basic idea merits attention because of its high source, its durability, and the fact that it finds impressive support outside the ICC as well. For example, the President of the Association of American Railroads testified in January 1958 that although the AAR had long advocated, and still advocated, the total repeal of section 203(b)(6) of the Interstate Commerce Act,

[45] Furthermore, in one important instance, the legislative intent may conceivably have been restrictive, but the result was a broader exemption, even there. The Interstate Commerce Act's pt. II, on motor carriers, contains no definition of "ordinary livestock." Pt. I, on railroads, says "the term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. . . ." 24 Stat. 379 (1887), as amended, 49 U.S.C. § 20(11) (1952). This definition was the one contemplated when § 203(b)(6) of the Interstate Commerce Act was amended by insertion of "ordinary" before "livestock." Monark Egg Corp. Contract Carrier Application, 44 M.C.C. 15, 18 (1944). The actual effect of the change was to broaden § 203(b)(6), as this restriction of livestock to a list which omits poultry, caused poultry to be considered not as livestock (which needs to be *alive* in order to be livestock and hence exempt), but as coming under the miscellaneous phrase "agricultural commodities." As is noted below, the courts have declared that poultry, alive or slaughtered, is an agricultural commodity and hence exempt. Slaughtered poultry is far more important a form of traffic than are live race horses—which the word "ordinary" removed from the exemption in § 203(b)(6).

[46] S. 975, 77th Cong., 1st Sess. (1941).

[47] H.R. 10961, 84th Cong., 2d Sess. (1956).

[48] H.R. 5765, 85th Cong., 1st Sess. (1957).

[49] H.R. 12832, 85th Cong., 2d Sess. (1958). (Emphasis added.)

[50] CELIA SPERLING, THE AGRICULTURAL EXEMPTION IN INTERSTATE TRUCKING: A LEGISLATIVE AND JUDICIAL HISTORY 8-9, 11-13 (U.S. Dep't of Agriculture Marketing Research Rep. No. 188, 1957).

it now endorsed the bills embodying the ICC's farm-to-first-market proposals, as being "a step in the right direction."[51]

In March 1954, Senator Hoey, of North Carolina, introduced a bill that would have excluded from the agricultural-commodities exemption "leaf tobacco other than that moving from the farm to warehouse, other original storage or market."[52] This was a proposal to apply the farm-to-first-market restriction to a single commodity. A similar bill was introduced in May 1955 by Senators Thurmond and Byrd, of South Carolina and Virginia, respectively.[53] Neither bill was reported out of committee.

As noted above, from its enactment in 1935, down to August 1958, section 203(b)(6) of the Interstate Commerce Act contained a restriction that, on its face, appeared to be solely in terms of the character of the commodities hauled; and in ensuing litigation, the courts upheld such a construction. This means that, for example, a bale of cotton—grown, ginned, and compressed in Georgia—is still an agricultural commodity when it gets to Massachusetts, and not a "manufactured product" of cotton; and, furthermore, it can then be trucked to New Hampshire under section 203(b)(6) of the Interstate Commerce Act regardless of how many successive owners it has had and regardless of how many separate times it may have been hauled and warehoused along the way.

The ICC's farm-to-first-market proposals of at least two decades have been rather like that in the identical bills introduced in the Senate and House at the Commission's request in 1957.[54] These bills would have limited the exemption to the movement "from the point of production to a point where such commodities first pass out of the actual possession and control of the producer." The point of production was defined for fish as "the wharf . . . at which the fisherman debarks his catch," and for agricultural commodities as "the point at which grown, raised, or produced"; or for either as "the point at which . . . [they] are gathered for shipment." Like all earlier farm-to-first-market proposals, this one met defeat.

The rationale of this type of restriction is that the agricultural exemption was designed to help farmers, and only farmers, and that it is of no financial concern to the farmer whether the transportation of his crop, after he sells it, is cheap or costly, fast or slow. This is a delightful piece of doublethink that is probably believed by many of its advocates. It is true that once a specific farmer has sold a particular bale of cotton, the amount of money he receives for that bale of cotton is not affected by the subsequent transportation charges, beyond his point of delivery. This does not mean, however, that the price he is offered is unaffected by the *prospective* transportation charges beyond that point. Neither does it mean that the price his neighbor will receive for a bale of cotton later today, or the price he himself will receive for a bale of cotton next week, will be unaffected by the transportation charges, from his point of delivery onward, for the bale which the first-mentioned

[51] *Hearings, supra* note 25, at 24.
[52] S. 3117, 83d Cong., 2d Sess. (1954).
[53] S. 1891, 84th Cong., 1st Sess. (1955).
[54] S. 1689, H.R. 5823, 85th Cong., 1st Sess. (1957).

farmer sold today. When the Grangers rose in wrath against intolerable rate practices of the railroads, they knew better than to think that the freight charge on wheat was of no concern to them except while they held title to the grain. The economics of marketing of farm products is of deep concern to farmers regardless of who holds title at the successive stages. This wide view of the matter is reflected in a piece of farm legislation which covers a good deal more besides transportation—namely, the Agricultural Marketing Act of 1946.[55]

Among farm groups, it is recognized that the farmer benefits from low transportation charges and good transportation service in getting his product to the consumer. The benefit arises partly because a smaller charge for getting it there will leave the farmer a bigger return out of whatever price the consumer is willing to pay. As regards those farm products the demand for which is relatively elastic—those on which the price significantly affects the amount which consumers will buy—the farmer benefits from low transportation charges by being able to sell more. Maintenance of good quality in transit is likewise helpful to producers in that it encourages people to buy.

A peculiarity of the farm-to-first-market proposal for restriction of the agricultural-commodities exemption is that, for any given commodity, the ICC's regulation of trucking would begin at widely varying points in the marketing channel. The beginning point of this control would depend not merely upon the degree to which the commodity has been processed, but also upon whether the grower relinquishes title to the crop in the field, or in the community where the consumers live, or at some place between. For any given commodity, each of these practices may have its adherents. Enforcement personnel attempting to apprehend trucks subject to economic regulation but operating without ICC authorization would need to satisfy themselves not merely as to *what* is in a suspect truck, but also as to who owns it and *whether he grew it.*

To this maze, a further complication is added if the marketing is done by a co-operative (assuming, as is frequently true, that the co-operative has much of its trucking done by for-hire trucks instead of doing all of it in trucks owned by the co-operative). The ICC's regulatory powers over trucking would begin where the commodities "first pass out of the actual possession and control of the producer." When the commodities have passed from the possession of the grower to that of his co-operative, the question remains, when do they pass from his control? Indeed, if his own co-operative possesses them, has he yet lost possession?

Lest it be thought that the farm-to-first-market principle would let a vertically integrated farm enjoy the agricultural-commodities exemption all the way from the cotton field to a retail shirt shop, it should be noted that this principle is proposed to be tacked onto the already-existing restriction. The commodities would still be required to be agricultural, and not manufactured products thereof. As soon as the commodity becomes manufactured, *or* when it reaches the first market, whichever

[55] 60 Stat. 1087, 7 U.S.C. §§ 1621-27 (1952).

event occurs first, the exemption would cease. Indeed, some of the farm-to-first-market proposals from the ICC and other sources have been offered in combination with proposals for a tightening of the present restriction as to the kinds of commodities embraced by the exemption.

C. Early Proposals to Limit the Types of Commodities

The proposals to limit the agricultural commodities exemption have sometimes taken the form of supplementing the exclusion of "manufactured products" by naming, in broad or specific terms, still other commodities which are to be excluded. A bill introduced in March 1950 would have expressly excluded from "agricultural commodities" (and hence from the exemption) the products of slaughter and preserved, frozen, and manufactured products. From "fish," it would have excluded preserved, frozen, processed, and manufactured products.[56]

Section 203(b)(6) of the Interstate Commerce Act has, from the beginning, embraced "livestock" (later only "ordinary livestock"), a provision deemed[57] to exclude meats. But live poultry—although not regarded as livestock—was accepted by the ICC as an "agricultural commodity" before the Commission was compelled by the courts[58] to accept dressed poultry as being in that category. The court decisions (in 1953-56) to the effect that dressed poultry is an agricultural commodity have led to proposals to insert "live poultry" into this section—in order that, by analogy to the divergent status of livestock and meats, dressed poultry would cease to be deemed an exempt commodity. Such was the approach to poultry in the bills which emanated from the ICC in March 1957 and died with the Eighty-fifth Congress.[59] These same bills would have expressly excluded all *frozen* foods from section 203(b)(6).

D. Exemption for American Products Only?

Until 1958, the agricultural-commodities exemption made no distinction as to whether the commodities were produced in this country or abroad. This fact prompted still another approach to the narrowing of the exemption: proposals to exclude imported products. At times, this has meant an exclusion of any consignment actually imported. Sometimes it has meant the listing, for exclusion, of particular commodities not commercially produced in the continental United States. The latter approach is merely a compromise for the sake of practicality. Eggs in trucks near the Canadian border might need to carry their birth certificate with them if all imported products were excluded from the exemption. Furthermore, a truckload of eggs in that region is sometimes partly American and partly Canadian in origin. The whole of such a load would be excluded from the exemption, in as much as the presence of any amount of a nonexempt commodity in a given truck-

[56] H.R. 7547, 81st Cong., 2d Sess. (1950).

[57] Frozen Food Express v. United States, 128 F. Supp. 374 (S.D. Tex. 1955).

[58] ICC v. Kroblin, 113 F. Supp. 599 (N.D. Iowa 1953), *aff'd*, 212 F.2d 555 (8th Cir.), *cert. denied*, 348 U.S. 836 (1954). East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49 (1956).

[59] See note 54 *supra*.

load brings the whole truckload under economic regulation. Nevertheless, the first of these two ideas has been advocated by the ICC to Congress.[60]

VIII

THE AGRICULTURAL EXEMPTIONS' JUDICIAL HISTORY

A. Poisoned Vehicles and the Channels of Commerce

A basic legal difference as to the freight traffic of railroads and of regulated motor carriers is that railroads are required to provide a comprehensive freight service,[61] whereas regulated truckers are permitted to haul only the commodities specified in their operating authority. This may be a rather limited array, regardless of whether the trucker is a common or a contract carrier.

When someone engaged in interstate trucking says that the service falls within section 203(b)(5) or (6) of the Interstate Commerce Act and this person lacks operating authority from the ICC for the particular movements of the particular commodities involved, a holding by the Commission that the trucking operation is not within the exemption means that the person must get such operating authority or go out of business. If the Commission rules that the transportation at issue is not within the exemption, it may or may not thereupon grant operating authority—a permit to a contract carrier or a certificate of convenience and necessity to a common carrier.

In the judicial history of the agricultural exemptions, the ICC has, with perseverance and ingenuity, stuck to the principle that exemptions in remedial legislation are to be strictly construed in order that the basic statute itself be liberally construed—*i.e.*, in order that the latter will have broad application.[62] Litigation as to the scope of the agricultural exemptions has been concerned chiefly with section 203(b)(6) of the Interstate Commerce Act, the agricultural-commodities exemption, the most commercial of the three. The poisoned-vehicle doctrine arose quite early, as a restriction on trucking under section 203(b)(6). For example, in *Williams Contract Carrier Application*, in 1937,[63] the ICC held that intrastate, for-hire hauling of farm machinery in Williams's one truck precluded its being used, even on separate hauls, for the interstate, for-hire movement of agricultural commodities on an exempt basis. However, the Commission did not regard the private trucking of nonagricultural commodities as tainting a vehicle against the for-hire trucking of exempt commodities.[64]

As noted, Congress tried to dispel the poisoned-vehicle doctrine in 1938;[65] but the doctrine was still good law from the Commission's standpoint two years later, in

[60] 69 ICC ANN. REP. 128 (1955).
[61] *Hearings*, *supra* note 25, at 15.
[62] Monroe Common Carrier Application, 8 M.C.C. 183, 185 (1938).
[63] 2 M.C.C. 685 (1937).
[64] Monroe Common Carrier Application, 8 M.C.C. 183 (1938).
[65] See note 42 *supra*.

the first *Monark Egg* case.[66] Monark Egg Corporation operated trucks to haul its own eggs. For back-haul, on a for-hire basis, it trucked fish, oysters, New York-dressed poultry (*i.e.*, killed and plucked but not eviscerated), and shelled nuts, all of which it claimed were within section 203(b)(6) of the Interstate Commerce Act. The Commission ruled that the poultry and nuts were nonexempt. It said, moreover, that if any commodity ever hauled by any given truck for compensation were nonexempt, then all subsequent interstate trucking in that vehicle would be subject to economic regulation. In this fashion, the ICC found that each of Monark's trucks was subject to such regulation.

The case was reheard on request, and the Commission shifted to the "channels of commerce" principle.[67] For some years, the ICC adhered to both this principle and the poisoned-vehicle doctrine. Indeed, there is nothing inconsistent between them; and, in any given situation, one or the other, or both, may be handy for restricting the agricultural-commodities exemption. The channels-of-commerce idea is an approach (through *interpretation* of the statute) that is similar to the farm-to-first-market idea that the Commission has recurrently advocated as an *amendment* to the statute.

Shelled peanuts were a part of Monark's for-hire traffic. The ICC declared:[68]

> . . . When the peanut has reached the shelling plant and has been processed by removal of the shell, it has entered the ordinary channels of commerce and the operation performed upon it at that point removes it from the class of unmanufactured agricultural commodities which was intended to be designated by . . . [section 203(b)(6) of the Interstate Commerce Act].

Similarly, the Commission remarked that "the commercial killing and dressing of poultry" is generally done, not by farmers, but by packing firms. Also, the subsequent transportation is under refrigeration. Hence the poultry is no longer an unmanufactured agricultural commodity.

The channels-of-commerce doctrine (unlike the farm-to-first-market idea) does not hinge upon whether a particular consignment of a commodity is still owned by the farmer who produced it. It is a somewhat less mercurial standard, hinged upon what is customary with regard to the commodity at issue. But even custom can be fickle. In the same case, the ICC tried to apply the channels-of-commerce principle to fish—much of which is beheaded and gutted before being landed from the fishing boat. The situations were so varied that the Commission concluded "that only fish and shellfish dead or alive, as taken from the water, are within the purview of this exemption."[69]

The channels-of-commerce principle was invoked in the *Harwood* case, in 1947, where the ICC found that "the washing, cleaning, and packaging of fresh vegetables in cellophane bags . . . for sale to consumers place such commodities in the ordinary

[66] Monark Egg Corp. Contract Carrier Application, 26 M.C.C. 615 (1940).
[67] Monark Egg Corp. Contract Carrier Application, 44 M.C.C. 15 (1944).
[68] *Id.* at 19.
[69] *Id.* at 21.

channels of commerce and remove them from the class of unmanufactured agricultural commodities . . ." covered by section 203(b)(6) of the Interstate Commerce Act.[70] Harwood wanted to use his four vehicles part of the time for hauling commodities recognized by the Commission as agricultural, but that body invoked the poisoned-vehicle doctrine as well, and thus adjudged *all* of his proposed interstate, for-hire trucking to be subject to regulation.

The *Dunn* case involved interstate, for-hire trucking of baled cotton and intrastate, for-hire trucking of admittedly nonagricultural commodities. For the latter service, Dunn possessed operating authority from the Georgia Public Service Commission. The ICC, relying on the poisoned-vehicle doctrine, sought to enjoin him from the interstate trucking of cotton unless he obtained operating authority from it. The district and circuit courts held for Dunn.[71] The Circuit Court rejected the poisoned-vehicle doctrine regardless of whether the nonagricultural commodities move in intra- or interstate commerce and showed a lively awareness of those aspects of transport economics which preoccupy the friends of the agricultural-commodities exemption. "It is rare," said the court, "for a motor vehicle to be used for no other purpose than the carriage of agricultural commodities. Such carriage is usually seasonal or intermittent."[72] Such use and other uses are complementary; and the vehicles of nonagricultural truckers like Dunn, whose five trucks made a total of only nineteen interstate trips with cotton in 1946, are, the court declared, a reserve supply of equipment for the movement of agricultural commodities and fish.

But what of the view that such a trucker as Dunn should meet his problem and the farmer's need for transportation by getting operating authority from the ICC? The court paid its respects to the conflict between certain administrative processes and marketing. "To get a certificate or permit from the [Interstate Commerce] Commission involves much delay, inconvenience, and expense, and often disappointment. Relief from this is offered [by section 203(b)(6) of the Interstate Commerce Act] in order to aid the prompt and free transportation of the named commodities, which transportation is . . . often urgent because it is of perishables. . . ."[73] The court did not apply this last word to cotton, but observed that section 203(b)(6) of the Interstate Commerce Act is so phrased as to embrace perishables and nonperishables alike:[74]

> The general policy[75] of the Interstate Commerce Act . . . includes "to cooperate with the several States and the duly authorized officials thereof" . . . But the proposed construction makes war on the intrastate business which Dunn has been authorized to do by the officials of the State . . . . [It] also makes war on the very interstate transportation which the exemption was plainly intended to foster and encourage.

[70] Harwood Contract Carrier Application, 47 M.C.C. 597, 599 (1947).

[71] ICC v. Dunn, 166 F.2d 116 (5th Cir. 1948).

[72] 166 F.2d at 118 (quoting from Monroe Common Carrier Application, 8 M.C.C. 183, 185 (1938)).

[73] *Ibid.*

[74] 166 F.2d at 118.

[75] Added by 54 Stat. 899 (1940), 49 U.S.C. declaration preceding § 1 (1952).

To the court's remarks, it could be added that the poisoned-vehicle doctrine would preclude most trip-leasing by exempt truckers.

Commissioner Lee, in his dissent from the second *Monark Egg* decision, had declined to go along with the majority of ICC Division Five in its reliance on the channels-of-commerce principle and, instead, used the test which has since come to be called that of "continuing substantial identity." He cited two Supreme Court decisions[76] under the tariff laws to the effect that "the application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article . . ." unless the result is "a new and different article having a distinctive name, character or use." From the *Anheuser-Busch* case, he quoted a line that has since been echoed, with variations, in the judicial history of section 203(b)(6) of the Interstate Commerce Act: "A cork put through the claimant's process is still a cork." Using this approach, he declared dressed poultry and shelled peanuts not to be manufactured.[77]

In *ICC v. Love,* the courts reversed an ICC ruling that fresh and frozen beheaded shrimp are outside the exemption.[78] It appeared that shrimp were not hauled in any other condition beyond the point of debarkation. The court decisions in the *Love* case were important for practical reasons, since they kept the ICC from reducing the exemption for shrimp to a nullity. Also, in retrospect, the district court's language can be viewed as a step toward judicial acceptance of the test for which Commissioner Lee argued; and, indeed, the court cited with approval some conclusions he had reached in the above dissent—but without mentioning the test that he had advocated or any other test (except common usage of words found in the statute) that would enable one to distinguish between things that are still fish or agricultural commodities and those that have been such but, in the course of processing, have ceased to be. The ICC's view in 1958 was that the *Love* decision in 1948 began an excessive enlargement of the agricultural-commodities concept.[79]

In the *Love* case, the district court cited with approval[79a] an ICC ruling[79b] that, in section 203(b)(6) of the Interstate Commerce Act, the phrase "(not including manufactured products thereof)" modifies only "agricultural commodities," and not "fish" or "livestock."

After the district court's decision in the *Love* case, the ICC reopened the *Monark Egg* case, so far as fish were concerned. The ICC now held that[80]

"fish (including shell fish)" . . . includes frozen, quick frozen, and unfrozen fish in the various forms in which it is shipped, such as . . . beheaded and gutted fish, filleted fish,

[76] Hartranft v. Wiegmann, 121 U.S. 609 (1887); Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556, 562 (1908).
[77] 44 M.C.C. at 22-23 (1944).
[78] 77 F. Supp. 63 (E.D. La. 1948), *aff'd, per curiam,* 172 F.2d 224 (5th Cir. 1949).
[79] *Hearings, supra* note 25, at 1830-31.
[79a] 77 F. Supp. at 66-67.
[79b] Monark Egg Corp. Contract Carrier Application, 44 M.C.C. 15, 17-18 (1944).
[80] Monark Egg Corp. Contract Carrier Application, 49 M.C.C. 693, 699 (1949) (the Commission's third decision in this case).

. . . crab meat and lobster meat, but excluding fish in hermetically sealed containers or fish which has been otherwise treated for preserving such as smoked. . . .

The Commission remarked that, like shrimp, these "other species of . . . fish . . . are never transported to the market in the form in which they are taken from the water." That is to say, the broader conception now applied to sundry species of the fish mentioned in section 203(b)(6) of the Interstate Commerce Act was necessary if the exemption was to mean anything for fish—a point which the court had made as regards beheaded shrimp in particular, in the *Love* case.

In *ICC v. Weldon*, the district court held that raw, shelled peanuts are not "an agricultural commodity . . . in its natural state," but, as declared by the ICC, a manufactured product.[81] This decision has, on occasion, been regarded as embodying the channels-of-commerce principle. Some of the language gives color to that contention, but the decision could even more persuasively be classed as one not based on any clearly stated test.

Although the ICC was not yet ready to abandon the poisoned-vehicle doctrine, another circuit court, in *ICC v. Service Trucking Co.*, citing the holding in the *Dunn* case, joined in condemning this doctrine.[82] The Service Trucking Company did *interstate* trucking of both the concededly agricultural commodity (eggs in the shell) and the allegedly nonagricultural commodity (dressed poultry) in the same vehicles; but this distinction from the *Dunn* case was not viewed by the court as material. Now, too, the decision hinged on the fact that the two commodities were hauled on separate occasions.

For some years, the ICC has not applied the poisoned-vehicle doctrine. Instead, it has proceeded as if section 203(b)(6) of the Interstate Commerce Act were an exemption of "motor vehicles *while* used in carrying . . . agricultural commodities . . . , if such motor vehicles are not *at the same time* used in carrying any other property, or passengers, for compensation." (The italicized words are not a part of the statute's actual phrasing; but the Act's legislative history warrants interpreting the section as if it were, indeed, thus phrased.) A substantial part of the trucking under this exemption is back-haul by regulated carriers—some of them very large—that lack balanced traffic. While any truck owned and operated by an ICC-regulated motor carrier is hauling a load of, let us say, fresh vegetables, the rates charged and the origin and destination served are completely free of ICC control—even though the movement be interstate and for-hire.

B. Continuing Substantial Identity: Early Developments

Because the ICC and the courts were somewhat at odds as to what commodities fall within section 203(b)(6) of the Interstate Commerce Act, the Commission, on its own motion, instituted an investigation (the *Determinations* case[83]) as to what are

[81] 90 F. Supp. 873 (W.D. Tenn. 1950), *aff'd*, 188 F.2d 367 (6th Cir.), *cert. denied*, 342 U.S. 827 (1951).

[82] 186 F.2d 400 (3d Cir. 1951).

[83] Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951).

"agricultural commodities (not including manufactured products thereof)." Upon petition by the United States Department of Agriculture and others, it reopened the *Harwood* case (involving washed, cellophane-packed vegetables) for hearing on a consolidated record with the investigation proceeding. The Department of Agriculture contended that the exemption[84]

> should be construed by the Commission to exempt the transportation of all agricultural commodities on which some labor has been performed or mechanical skill applied in order to place such commodities on the consumer markets so long as such treatment does not clearly and by scientific analysis constitute manufacturing.

On the Department's behalf, natural scientists testified as to which forms of processing change an agricultural commodity into a manufactured product.

The ICC decided that[85]

> . . . the term "agricultural commodities" as used in section 203(b)(6) embraces all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey).

It also concluded that[86]

> . . . the term "(not including manufactured products thereof)" means agricultural commodities in their natural state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties, or combinations.

This is the idea elsewhere called "continuing substantial identity." In the proceeding leading up to this opinion, those who opposed such a view were chiefly advocates of the channels-of-commerce principle.

The latter principle was here expressly rejected by the ICC. Oddly enough for a body that had so staunchly upheld the channels-of-commerce restriction upon section 203(b)(6) of the Interstate Commerce Act, the ICC now referred to remarks in the 1935 congressional debate by the subcommittee chairman sponsoring the amendment that had replaced "unprocessed agricultural products" with "agricultural commodities (not including manufactured products thereof)." The Commission now discovered that—although pasteurization "is customarily done . . . in the larger cities"—the subcommittee chairman had mentioned pasteurized milk as being within the language which he proposed. The Commission even alluded to the fact that pasteurized milk usually moves in bottles (a consumer package). When the ICC made these belated discoveries, it seemed to accept a vastly broader conception of section 203(b)(6) of the Interstate Commerce Act than it had long tried to apply. In rejecting the channels-of-commerce principle, the ICC even said that, "in many instances, [it would] prevent the movement by exempt vehicle of items processed or packaged by farmers themselves, a result obviously not intended by Congress."[87]

[84] SPERLING, *op. cit. supra* note 50, at 27-28.
[85] Determination of Exempted Agricultural Commodities, 52 M.C.C. 511, 519 (1951).
[86] *Id.* at 521.
[87] *Id.* at 524.

In its findings, the Commission specified some commodities (*e.g.*, pasteurized, homogenized milk, with vitamin D added) that it deemed to be agricultural and not manufactured ("unmanufactured agricultural commodities").[88] It specified others (*e.g.*, frozen milk) that it deemed to be manufactured products of agricultural commodities.[89] It specified others (*e.g.*, nursery stock, flowers, and bulbs) that it deemed not to be agricultural, regardless of how unmanufactured they might be.[90] Of course, not one of these three groups purported to be exhaustive. However, these findings, plus a discussion in the decision as to various types of processing, were intended as a future guide to determinations concerning commodities not covered by the findings in this decision. Yet, if the *Determinations* case was intended as the dawn of a new day in distinguishing between agricultural commodities and manufactured products, the dawn was murky. Thus, with regard to dehydrated, pulverized, packaged manure, the Commission decided that ". . . the evidence is not sufficiently comprehensive to enable us to determine the point at which the commodity becomes a manufactured product."[91] Apparently it does become one, the only question being: When?

The ICC also reversed its *Harwood* decision and ordered that in so far as its other past findings about specific commodities differed from those made in the *Determinations* case, the former be overruled. Concurrently with this decision, the Commission handed down a new opinion in the *Monark Egg* case—its fourth decision in that hardy proceeding.[92] As regards fish and shellfish, the ICC expressly rejected the channels-of-commerce principle and spoke of the various kinds of processing of fish as causing or not causing the fish to lose their identity as fish.

In *ICC v. Yeary Transfer Co.*, redried leaf tobacco (a product not visibly different from that which goes into the redrying chamber) was held by the courts not to have become a manufactured commodity.[93] The district court's decision, which was affirmed *per curiam* by the court of appeals, was not explicit as to the test to be applied in determining whether the product was manufactured. It cited the *Anheuser-Busch*[94] and *American Fruit Growers*[95] cases, however, and on that score and in its phrasing, it was consistent with the continuing-substantial-identity test. Bills introduced in Congress afterward would have had the effect of reversing this holding as to the particular commodity at issue,[96] but they died aborning.

C. The *Kroblin* Case[97]

The *Kroblin* decision is viewed by some of the opponents of the agricultural-commodities exemption as having opened the floodgates for an alarmingly broad in-

[88] *Id.* at 551.
[89] *Ibid.*
[90] *Id.* at 555.
[91] *Id.* at 549.
[92] Monark Egg Corp. Contract Carrier Application, 52 M.C.C. 576, 581 (1951).
[93] 104 F. Supp. 245 (E.D. Ky. 1952), *aff'd*, 202 F.2d 151 (6th Cir. 1953).
[94] Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556 (1908).
[95] American Fruit Growers, Inc. v. Brogdex Co., 283 U.S. 1 (1931) (a case under the patent laws).
[96] S. 3117, 83d Cong., 2d Sess. (1954); S. 1891, 84th Cong., 1st Sess. (1955).
[97] ICC v. Kroblin, 113 F. Supp. 599 (N.D. Iowa 1953), *aff'd*, 212 F.2d 555 (8th Cir.), *cert. denied*, 348 U.S. 836 (1954).

terpretation of section 203(b)(6) of the Interstate Commerce Act. Among the friends of this exemption, there are some who view the *Kroblin* decision as a monumental return to the intent of Congress, after lamentable divergence by the ICC.

Kroblin, without benefit of ICC operating authority, engaged in the interstate trucking of fresh dressed poultry, both eviscerated and New York-dressed. The ICC contended that when Congress changed the proposed exemption from "unprocessed agricultural commodities" to "agricultural commodities (not including manufactured products thereof)" in 1935, its purpose was simply to make sure that ginned cotton and pasteurized milk were within the exemption. Kroblin and the Secretary of Agriculture (as amicus curiae) claimed that the amendment was not intended to be thus limited and that Congress intended that other agricultural commodities which have been processed without becoming manufactured would not lose their exempt status by virtue of being processed. They also pointed out that, with but a single exception, all court tests of the validity of the ICC's interpretations of section 203(b)(6) of the Interstate Commerce Act had resulted in decisions that these interpretations were erroneous. The district court, after reviewing the exemption's legislative history, held for Kroblin. It said that ". . . an opposite holding would . . . constitute an attempt to accomplish by . . . judicial construction that which Congress has steadfastly refused to allow to be accomplished by legislation."[98] The court of appeals affirmed the decision, and the Supreme Court denied certiorari.

The *Kroblin* case did not establish a new test as to whether a commodity falls within the agricultural-commodities exemption; yet it accomplished something at least as valuable. Judge Graven, of the Northern District of Iowa, served in the socially useful role of historian. By tracing the exemption's career from 1935 onward in Congress, before the ICC, and in the courts, he reminded those with a will to listen that the exemption was initially meant by Congress to be of substantial scope and that Congress had remained steadfast in this attitude. His analysis of the Commission's equally steadfast but inevitably complex efforts at a very restrictive interpretation of the exemption made clear that an approach markedly different from those that had generally been used thus far by the ICC was appropriate. But he made no such summary of his own analysis.

D. Continuing Substantial Identity: Triumph of the Doctrine

A short while later, the Supreme Court handed down a decision holding both fresh and frozen dressed poultry to be within section 203(b)(6) of the Interstate Commerce Act.[99] Frozen Food Express Company, a motor common carrier certificated by the ICC, was engaged in the interstate, for-hire trucking of such poultry and also fresh and frozen meats and meat products between points not authorized by its certificate. It claimed all of these commodities were within section 203(b)(6) of the Interstate Commerce Act. The ICC, finding none of these commodities to be

[98] 113 F. Supp. at 631.

[99] East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49 (1956), *affirming in part*, Frozen Food Express v. United States, 128 F. Supp. 374 (S.D. Texas 1955).

within the exemption, sought to compel the carrier to desist from the transportation involved. A three-judge district court held that fresh and frozen dressed poultry are agricultural commodities, but that the other commodities fall neither within that class nor within the category of livestock.

As to these latter commodities, Frozen Food Express accepted its defeat; but as to dressed poultry, the ICC and certain regulated carriers by rail and highway appealed. In a five-to-four decision, the Supreme Court held that dressed poultry, whether fresh or frozen, is an agricultural commodity. Mr. Justice Douglas, for the majority, cited the *Anheuser-Busch* decision of the Supreme Court as to import duties. There the Court had said,[100]

> Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary. . . . There must be transformation; a new and different article must emerge, "having a distinctive name, character or use."

This was the decision and this was the test that Commissioner Lee had cited a dozen years before, when he tried to persuade his brethren that dressed poultry and shelled peanuts are not manufactured products.[101]

The idea that processing may or may not have so much effect as to constitute manufacturing is an echo not only of the *Anheuser-Busch* decision, but of the *Hartranft*[102] and *American Fruit Growers* decisions as well. "A chicken that has been killed and dressed," the Supreme Court declared in the *East Texas Motor Freight Lines* case,[103]

> is still a chicken. . . . [W]e cannot conclude that this processing which merely makes the chicken marketable turns it into a "manufactured" commodity.
>
> At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of Section 203(b)(6) [of the Interstate Commerce Act].

Here was the continuing-substantial-identity test in clear-cut form; and the Court also rejected the channels-of-commerce doctrine, although not by name.[103a]

The Court, citing the congressional debate in 1935, said that the exemption in section 203(b)(6) of the Interstate Commerce Act[104]

> was designed to preserve for the farmers the advantage of low-cost motor transportation. . . .[105] The victory in the Congress for the exemption was recognition that the

[100] 207 U.S. at 562.

[101] See *supra* notes 76 and 77, and accompanying text.

[102] Hartranft v. Wiegmann, 121 U.S. 609 (1887).

[103] East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49, 54 (1956).

[103a] *Id.* at 54 n. 3.

[104] *Id.* at 51-52. (Emphasis added.)

[105] In the *Kroblin* case, the district court remarked: "In the present case, it was claimed . . . by counsel for the defendant and the Secretary of Agriculture that the biggest benefit to the farmers of exempting commercial truckers engaged in hauling farm commodities from the certificate provisions of the Act was the flexibility of operations permitted such carriers." 113 F. Supp. at 627. This advantage differs from the one accented by the Supreme Court.

price which the farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state *or after they have become marketable by incidental processing.*

"Killing, dressing, and freezing a chicken" were apparently viewed by the Court as meeting the latter description and were stated to be[106]

no more drastic a change than the change which takes place in milk from pasteurizing, homogenizing, adding vitamin concentrates, standardizing, and bottling. Yet the Commission agrees that milk so processed is not a "manufactured" product but falls within the meaning of the "agricultural" exemption.

Mr. Justice Burton, for the minority, noted that no appeal had been taken from the ICC's decision that fresh and frozen meats are manufactured products. "The Commission's like treatment of poultry is not arbitrary or unreasonable."[107] Neither Mr. Justice Burton nor Mr. Justice Douglas remarked that the ICC itself distinguishes between live poultry, which it regards as an agricultural commodity, and ordinary livestock, which it views as a special category.[108] Certainly "ordinary livestock" is specifically named in section 203(b)(6) of the Interstate Commerce Act, and if the term does not include poultry, but poultry is an "agricultural commodity" instead, then the slaughtered form of these respective animals can be viewed differently as well.

Two weeks later, a three-judge district court in the State of Washington applied the continuing-substantial-identity test to frozen fruits and vegetables and held them to be within section 203(b)(6) of the Interstate Commerce Act on the authority of *East Texas Motor Freight Lines v. Frozen Food Express.*[109] Using that same precedent, a three-judge district court in New Jersey soon overruled the ICC's contention that—even on the basis of the continuing-substantial-identity test—raw, shelled nuts are manufactured. "We think that it must be said that a raw shelled nut is substantially identical to a raw unshelled nut" said the court.[110] Similarly, a three-judge district court in Texas in 1956 took its cue from this Supreme Court decision, and, on the basis of the continuing-substantial-identity test, it held that various commodities, including raw, shelled peanuts, were agricultural,[111] although they were adjudged by the ICC in the *Determinations* case to be manufactured. The ICC appealed from the Texas decision only as regards dried egg powder, dried egg yolks, powdered milk, buttermilk, and quick-frozen fruits and vegetables. The Supreme Court upheld the lower court.[112]

The regulated motor-carrier industry and the railroad industry expressed mounting alarm over this swift tide of events. The ICC itself showed signs of accepting

[106] 351 U.S. at 52.
[107] *Id.* at 55.
[108] Determination of Exempted Agricultural Commodities, 52 M.C.C. 511, 519 (1951).
[109] Home Transfer & Storage Co. v. United States, 141 F. Supp. 599 (W.D. Wash.), *aff'd mem.*, 352 U.S. 884 (1956).
[110] Consolidated Truck Service v. United States, 144 F. Supp. 814, 818 (D.N.J. 1956).
[111] Frozen Food Express v. United States, 148 F. Supp. 399 (S.D. Texas 1956).
[112] 355 U.S. 6 (1957), *affirming per curiam.*

a broader conception of section 203(b)(6) of the Interstate Commerce Act. On February 11, 1958, applying the continuing-substantial-identity test, the Commission decided that tea, cocoa beans, green coffee beans, and salt-cured cucumbers were agricultural commodities. In connection with the first three of these, the Commission concluded that the exemption embraces alike the foreign-grown and the domestically-grown agricultural commodity[113]—a view for which there was judicial precedent.[114] Commissioners Arpaia and Hutchinson expressed their indignation and incredulity as regards an exemption to benefit farmers in foreign countries. They also denounced the continuing-substantial-identity test as vague and uncertain; and they attacked the exemption itself as fostering chaotic, discriminatory rates, poor service, and violations of safety rules. Closely similar views were being expressed at the same time in the hearings on problems of the railroads, before the Smathers Subcommittee in the Senate.[115]

E. Neither Either Nor Or

Quite apart from determinations as to whether a commodity has made the transition from "agricultural" to "manufactured," there are decisions as to whether a commodity ever *has* been agricultural. The latter kind of question has not been an abundant source of litigation. As noted above, the ICC held in the *Determinations* case in 1951 that nursery stock, flowers, and bulbs are not "agricultural." By July 23, 1952, when a district court decided that "agricultural" includes "horticultural" and hence includes cut gladiolus and gladiolus bulbs,[116] Congress had—on July 9—amended sections 203(b)(4a) and (6) of the Interstate Commerce Act by inserting "(including horticultural)" after "agricultural."[117] Peat moss has also been found to be agricultural,[118] despite the ICC's view that it neither is nor has been agricultural.

F. Litigation as to Co-operative Trucking

There has been a small amount of litigation as to the scope of section 203(b)(5) of the Interstate Commerce Act, which deals with trucking by farmer co-operatives. In *ICC v. Jamestown Farmers' Union Federated Cooperative Transportation Association*,[119] appellee was a federation of farmer co-operative associations, possessing no greater powers or purposes than those possessed by each of its member co-operatives. The latter observed the restrictions in the Agricultural Marketing Act of 1929. Appellee's sole business was the trucking of livestock from North Dakota to South St. Paul Stockyards, in Minnesota, and merchandise on the return haul to North Dakota. All livestock was received by appellee from its member co-operatives, and all merchandise was received from member co-operatives and delivered to other

[113] Determination of Exempted Agricultural Commodities (reopened for further consideration), 74 M.C.C. 549 (1958).
[114] Premier Peat Moss Corp. v. United States, 147 F. Supp. 169 (S.D.N.Y. 1956).
[115] *Hearings, supra* note 25, *passim*.
[116] Florida Gladiolus Growers Ass'n v. United States, 106 F. Supp. 525 (S.D. Fla. 1952).
[117] 66 Stat. 479 (1952).
[118] Premier Peat Moss Corp. v. United States, 147 F. Supp. 169 (S.D.N.Y. 1956).
[119] 151 F.2d 403 (8th Cir. 1945).

member co-operatives. Between three and fourteen per cent of this merchandise was eventually bought by nonfarmers. The typical run—outbound or inbound—neither began nor ended at a farm.

On these facts, the ICC sought to hang a conclusion that appellee's hauling of merchandise was, from the standpoint of the Agricultural Marketing Act of 1929, neither a "farm business service" nor an authorized activity of a co-operative, and that appellee consequently was not entitled to the exemption set out in section 203(b)(5) of the Interstate Commerce Act. The Commission stated that these conclusions were required by a strict construction of that exemption.

The court of appeals held that it was not the exemption but the Agricultural Marketing Act of 1929 that required construction and that, being remedial, this act was entitled to a liberal construction. The court found that nothing in the Marketing Act required the transportation done by a co-operative to begin or end on a farm; hence it held that no such requirement might be applied to a federation of such co-operatives. As noted earlier, the Marketing Act requires only that a co-operative "not deal in farm products, farm supplies, and farm business services with or for non-members in an amount greater in value than the total amount of such business transacted by it with or for members." The court (implying that the nonfarmers who ultimately bought some of the merchandise hauled by the Jamestown federation were necessarily nonmembers of it and of its co-operatives) strongly asserted the right of either a farmer co-operative or a federation of such co-operatives to transport farm supplies and to render farm service to or for nonmembers so long as it stays within the fifty per cent limit. With regard to all transportation in which it had been engaging, the appellee was held entitled to the exemption for trucking by farmer co-operatives set out in the Interstate Commerce Act.

The court did not discuss whether something potentially usable as farm supplies but actually used in part by nonfarmers (*e.g.*, steel fence posts) is "farm supplies" if used by nonfarmers. If that approach to the exemption for trucking by co-operatives be adopted, however, there emerges the startling fact that the Marketing Act does not expressly prohibit a farmer co-operative from hauling nonagricultural cargo, such as oil-drilling equipment, for nonmembers in *any* amount. The fifty per cent rule, on its face, merely says that for nonmembers, the co-operative must not deal in *farm* products, *farm* supplies, and *farm* business services in an amount greater in value than the total amount of these same types of dealings undertaken by it for members. It is silent as to commodities and services which are exclusively nonagricultural. And the Interstate Commerce Act exempts "motor vehicles controlled and operated by" a farmer co-operative or federation of such co-operatives, without explicit reference to what the vehicles haul. But even if the legislation is broad, there is, as yet, no evidence that many organizations identifying themselves as farmer co-operatives exploit it to its greatest limit. The United States Department of Agriculture has urged upon farmer co-operatives that if they engage in *any* kind of transportation not directly connected with their business for members, this should

be incidental to something done for members (*e.g.*, handling back-haul cargo for nonmembers when the outbound cargo is hauled for members). This may, indeed, be the discreet thing for any farmer co-operative to do if it does not wish to forfeit certain federal income tax exemptions available to farmer co-operatives.[120]

IX

EXEMPT TRUCKING'S IMPORTANCE AS TO VOLUME

The role of trucking in the nation's transportation is large, and it is on the increase, both in terms of tons and in terms of the ratio to the rail share of the freight traffic. In 1956, the railroads accounted for a bit less than half the nation's ton-miles, while the remainder was divided, almost equally, among the trucks, the oil pipelines, and the inland water carriers.[121] The railroads, thinking of what might have been, decline to take comfort from the fact that in 1956, they accounted for nearly twice as many ton-miles as they did in 1939. While the rail ton-miles grew from 339 billion to 656 billion the truck ton-miles mounted from 53 billion to 254 billion.

There are no comprehensive statistics showing how much of this truck transportation was under the agricultural exemptions. The data at hand, however, are indicative enough. In 1957, at thirteen of the nation's biggest cities combined, for an important group of eight fresh fruits and vegetables, of all that was unloaded, sixty-two per cent had arrived by truck.[122] Predominantly, the produce was hauled interstate. The part that moved interstate by truck moved presumably either by private truck or, if by for-hire truck, under the agricultural exemptions. In recent years, eighty-odd per cent of the cattle, calves, and hogs reaching the major public markets arrived there by truck.[123] Again, a very substantial part of this traffic moved interstate and on a for-hire basis, and, therefore, moved under the exemptions.

In a recent nation-wide sample survey of the outbound transportation from poultry-processing firms which ship in interstate commerce, it was found that more than ninety-nine per cent of the volume of fresh dressed poultry, inter- and intrastate shipments combined, went by truck.[124] For frozen dressed poultry, roughly eighty-five per cent went by truck. The study covered two years for each commodity—the second being a twelve-month period beginning July 1, 1956, shortly after the Supreme Court's decision in the *East Texas Motor Freight Lines* case that fresh and frozen dressed poultry are agricultural commodities. The earlier year for

[120] U.S. Dep't of Agriculture, News for Farmer Cooperatives, May 1958, p. 16.

[121] CLEM C. LINNENBERG, JR., RAIL AND TRUCK SHARES IN THE HAULING OF PERISHABLES—SOME RECENT DEVELOPMENTS 41 (U.S. Dep't of Agriculture Research Rep. No. AMS-266, 1958). The figures here cited cover both for-hire and private transportation of perishables and nonperishables.

[122] *Id.* at 43.

[123] *Hearings, supra* note 25, at 1625.

[124] JAMES R. SNITZLER & ROBERT J. BYRNE, INTERSTATE TRUCKING OF FRESH AND FROZEN POULTRY UNDER AGRICULTURAL EXEMPTION 5, 9-20 (U.S. Dep't of Agriculture Marketing Research Rep. No. 224, 1958).

each commodity—1955 for frozen; 1952 for fresh—was a time at which the commodity had been held—either by only one district court, as regards the frozen product, or by no court, as regards the fresh product—to be agricultural. In the earlier period, the ICC's view that dressed poultry is a manufactured product was still dominant.

About three-fourths of the nation's commercial poultry processors ship in interstate commerce; and about three-fourths of the fresh and the frozen product of these interstate firms moved interstate during each year studied. This means that since the Supreme Court's decision in the *East Texas Motor Freight Lines* case, probably the greater part of this commodity has been moved out of the processing plants by means of transportation that is now exempt from ICC economic regulation. Of all the poultry moving out of the surveyed plants by truck in the latest year studied, about one-half of the fresh and three-fourths of the frozen moved by for-hire truck, and the rest moved by private truck. In so far as the interstate loads were concerned, for-hire and private movements alike were free of ICC economic regulation. Poultry is an important type of freight. It has a relatively high value per pound, which means that it can bear a higher transportation charge than many other commodities; and, in the last year covered by the cited transportation study, more than 3,000,000,000 pounds of dressed poultry moved out of the nation's commercial processing plants.

At the hearings of the Smathers Subcommittee in 1958, a witness for the National Fisheries Institute indicated that frozen seafood moves predominantly by truck, and that his own firm, one with gross annual sales of about $10,000,000, made shipments chiefly as split deliveries—*i.e.*, with each truckload having two or more consignees, a pattern unsuitable for rail shipment.[125]

X

Merits and Faults of Exempt Trucking

The arguments advanced in favor of exempt trucking hinge upon both a relatively low rate level and good service. The chief accusations against it are rate instability, poor service, and a bad safety record. There is a dearth of information or even discussion of the relative merits of regulated and exempt trucks from the standpoint of the welfare of the drivers and other personnel as to wages or hours or working conditions. Much of the exempt trucking is done by one-man firms. If the man behind the steering wheel wished to complain to the boss, he would have to complain to himself.

A representative of the United States Department of Agriculture testified in 1958 before the Smathers Subcommittee on the basis of the previously mentioned study of the trucking of dressed poultry under regulation and after decontrol, and on the basis of a similar study of the transportation of frozen fruits and vegetables.[126] He

[125] *Hearings, supra* note 25, at 1499-1500.
[126] *Id.* at 2101-2120.

emphasized "that the principal benefit [from exempt trucking] which is shown by the surveys . . . is the service benefits. . . ." He said that exempt trucking brought "the ability to reach more markets and a broader total market." Indeed, service is so important that, on occasion, exempt trucks haul a greater share of a particular type of traffic than do the railroads, even where railroad rates are lower,[127] or exempt trucks are able to charge shippers a higher rate than that charged by regulated trucks.[128]

In the before-and-after survey of the trucking of dressed poultry, the poultry processors were asked about the relative advantages of using regulated and exempt motor carriers. Their views on both pertained to the same period: the year following decontrol. To a substantial extent, the shippers continued to use regulated motor carriers, although the *transportation* provided by the latter was exempt, in the typical situation of moving a truckload consisting solely of exempt commodities. Four times as many processors attributed advantages to exempt motor carriers as to regulated ones; and more than twice as many attributed disadvantages to regulated motor carriers as to exempt ones.

Among the advantages said to be offered by regulated trucks were better service (such as ability to divert loads en route—*i.e.*, to act on telephoned or telegraphed instructions to change to a different destination—an important factor with price-sensitive commodities) and greater financial responsibility (more adequate cargo insurance). Among the disadvantages attributed to regulated truckers were that their trucks were not readily available, they were unwilling to serve off-line points, and their rates were too high. (Routes and rates were, of course, within the regulated carriers' discretion while engaged in exempt transportation.) More than one out of four processors made the first of these complaints; and more than one out of five made the last two.

One-fourth of the processors commended the exempt truckers for their lower rates; and one-fifth commended them for faster service, the availability of trucking equipment, and their willingness to serve out-of-way points. One processor out of ten complained that the exempt truckers had less financial responsibility than their rivals (less adequate cargo insurance); and one out of twelve said the exempt truckers were the less reliable (as to showing up at the promised time at shipping point or destination).

To a considerable extent, the advantages which the poultry processors saw in exempt motor carriers were the advantages of dealing with a small firm (*e.g.*, "having the same drivers haul the product"). The mental flexibility manifested in willingness to serve off-line points and to allow multiple stop-offs per load is a quality more to be expected in a man on-the-make than in an executive who has arrived. Among the exempt motor carriers covered by the survey, half had

[127] EZEKIEL LIMMER, RAILROAD AND TRUCK RATES AND MOVEMENTS OF FRESH FRUITS AND VEGETABLES FROM FLORIDA 18 (U.S. Dep't of Agriculture Research Rep. No. AMS-53, 1955).

[128] *Hearings*, *supra* note 25, at 1499.

fewer than ten trailers each, while only one-fourth of the regulated motor carriers were this small.

Decontrol was followed by a marked reduction in truck rates. For the numerous important origin-and-destination couplets covered by the survey, the average rate decline on fresh dressed poultry between 1952 and 1956-57 was thirty-three per cent; on frozen, between 1955 and 1956-57, it was thirty-six per cent. The shippers, nevertheless, were overwhelmingly of the opinion that the now-unregulated rates were stable—*i.e.*, they did not fluctuate daily or seasonally on the basis of the supply of and demand for trucking service.

To conventional economists, this will seem incredible. As a fact of life, it is, nevertheless, quite possible. There are some substantial shippers of other agricultural commodities who so emphatically believe that the orderly marketing of their output at satisfactory prices requires stability of transportation rates, that their wishes are respected by the truckers who serve them. There are other commodities, however, such as fresh vegetables from California, in the movement of which the behavior of unregulated truck rates is more nearly a reflection of day-to-day supply and demand.

In the transportation survey of dressed poultry, the processors were asked what effects they would expect from a removal of the exemption from their product. Their most common replies were: an increase in transportation charges, a loss of the more distant markets, and a return to private trucking.

To the Smathers Subcommittee, the ICC's chief complaint against the exemptions in the regulation of trucking and of water transportation was that exempt transport deprives regulated carriers of traffic.[129] On the basis of road checks (stopping and inspecting vehicles), the ICC also declares that unsafe equipment and practices, such as defective steering systems and the lack of an adequate driver's log (showing hours of service), are more prevalent among exempt trucks than among the regulated. A Scotch verdict would be more appropriate until the Commission compares exempt and regulated carriers of comparable size. On the average, the regulated trucking firms are considerably the larger; and the ICC's own road-check data indicate that, among these regulated carriers, the biggest have the safest equipment and practices.[130]

Before the Smathers Subcommittee, a new voice spoke of the exempt trucks' contribution to hazard on the highway. The National Agricultural Transportation League's Executive Secretary, in the course of presenting this Florida-fresh-fruit-and vegetable-trucker group's stand against the exemption of the commodities it hauls, said, "Our safety record is bad." He spoke less of defective equipment than of overworked drivers—trucks operated with a one-man crew instead of with two drivers and a sleeper-cab. He saw a link between shaky finances and unsafe performance on the road.[131]

[129] *Id.* at 1830-31.

[130] ICC Release, Safety Road-Check Results Announced by Motor Carrier Bureau, June 25, 1958, pp. 2, 6, and related releases.

[131] *Hearings*, *supra* note 25, at 982-83.

In more guarded form, the same sort of view was expressed by the president of a Texas group of fresh-fruit-and-vegetable truckers, the Perishable Commodity Carriers Association, Inc. On other counts, however, this witness was far from guarded. ". . . [I]n our area about one-third of the small exempt truckers go out of business a year," he said.[132] As for the vaunted responsibility of the regulated motor carrier, this witness declared:[133]

> You just check back and see where that freight line was about 25 years ago. He was a small trucker and he didn't amount to nothing. He couldn't pay his bills or anything. They regulated him to where he could get a decent price for his service and he amounts to something.

XI

RECENT RESTRICTIVE PROPOSALS

The regulated motor carriers have no basic quarrel with the existing pattern of federal regulation of transportation, despite the complaints that some segments of the trucking industry make against the agricultural exemptions and against trucking by private and contract carriers. The railroads' bill of particulars against the federal government's present policies regarding transportation is both long and grave, with the agricultural exemptions rating as a single item among many grievances. In January 1958, the Subcommittee on Surface Transportation (headed by Senator Smathers) of the Senate Committee on Interstate and Foreign Commerce began an extensive series of hearings entitled "Problems of the Railroads." The hearings clearly presupposed that the railroads had the most serious problems afflicting the nation's surface transportation system; and they resulted in the Transportation Act of 1958. This consists chiefly of amendments to the Interstate Commerce Act, most of them designed to help the railroads, the remainder designed to help the railroads and the regulated trucking industry. In this latter category is an elaborate amendment to the agricultural-commodities exemption. Nothing, however, was done to section 203(b)(4a) or (5) of the Interstate Commerce Act.

The ideas proposed in 1957-58 to the Eighty-fifth Congress for amending section 203(b)(6) of the Interstate Commerce Act varied widely. A bill introduced by Senator Smathers in July 1957[134] would have had this much in common with the existing statute: It would have expressed the exemption's boundaries in terms of the *stage of processing* reached by a commodity. However, the general distinction between agricultural commodities and manufactured products—a distinction long interpreted by the ICC and the courts—would have been extensively supplemented by specifying certain kinds of processing that would remove some commodity groups from within the exemption (*e.g.*, various commodities were to be excluded from

[132] *Id.* at 1005.

[133] *Id.* at 1008.

[134] S. 2553, 85th Cong., 1st Sess. (1957). This should not be confused with a later Smathers bill in the same Congress, S. 3778, 85th Cong., 2d Sess. (1958), introduced after the hearings on Problems of the Railroads, which became the Transportation Act of 1958.

the exemption if concentrated or frozen). Moreover, this bill *listed some commodities* that the courts had adjudged to be agricultural (*e.g.*, shelled peanuts), and it excluded them from the exemption. Both of these approaches embodied the idea, widely discussed in 1956-58, of a *roll-back*—a partial or complete undoing of the courts' recent decisions which had declared sundry commodities to be agricultural after the ICC had said they were manufactured.

Like other proposals to return to the good old days, the roll-back idea prompted diverse suggestions as to the point in history to which a return should be made and, indeed, the exact parts of the old landscape, as of any given date, that ought to be restored. The phrase "roll-back," however, was applied usually to "reregulating" one or more commodities the trucking of which the ICC had declared nonexempt and the courts had subsequently held to be exempt. The friends of the farm-to-first-market idea, even though they also declared themselves to be trying to return to the intent of Congress in 1935, did not usually call their proposal a roll-back (despite the ICC's long fidelity to the farm-to-first-market idea and its past use of the closely-akin channels-of-commerce principle). As for the poisoned-vehicle doctrine, any friends that it had were conspicuous by their silence.

The idea of a *freeze* on section 203(b)(6) of the Interstate Commerce Act had some support from organized agriculture[135] and other sources. Such a proposal apparently meant that Congress would amend the exemption in some way that would not involve a roll-back, but would, somehow, prevent the courts from declaring exempt any *additional* commodities that the ICC had thus far regarded as nonexempt. Nothing so drastic was proposed, however, as to deprive the courts of the authority to review ICC interpretations of the scope of section 203(b)(6) of the Interstate Commerce Act. Instead, the most nearly lucid embodiment of the freeze idea was a suggestion to the effect that Administrative Ruling 107 of the ICC Bureau of Motor Carriers, of March 19, 1958,[136] would hereafter be controlling as to which commodities are exempt and nonexempt. The listing in that ruling does not purport to be exhaustive for either category, and to treat it as such would create a twilight zone. The ruling merely lists those commodities which have been declared exempt or nonexempt as a result of proceedings before the ICC or the courts, or so declared by the ICC's Bureau of Motor Carriers in informal expressions of opinion.

A representative of the American Farm Bureau Federation stated to the Smathers Subcommittee that even though his organization was not trying to broaden the exemption beyond the present judicial interpretation, "we recognize that new crops may come into the picture, perhaps new grains, new oilseeds, et cetera, and that such new crops should be classified as agricultural commodities. . . ."[137] But one need not go so far as to envisage new crops. If only new types of processing are developed for present-day agricultural commodities, another twilight zone would

[135] *Hearings, supra* note 25, at 1357.
[136] 49 C.F.R. § 210.25 (Supp. 1959) [hereinafter referred to as Ruling 107].
[137] *Hearings, supra* note 25, at 1357.

be created, as the processing might or might not be deemed to go so far as to create new commodities, not known on March 19, 1958.

Among persons whose products were shipped under section 203(b)(6) of the Interstate Commerce Act, there was considerable apprehension in 1958 regarding any amendment to the section that would necessitate a repetition of the uncertain and costly process of litigation to *construe* the exemption.[138] They had an interest not merely in an established pattern of transportation, but also in a past series of proceedings before the ICC and in the courts. This latter interest would have been served either by a freeze (were one feasible) or by leaving section 203(b)(6) of the Interstate Commerce Act as it then stood.

The Association of American Railroads and the American Trucking Associations, Inc., showed an impressive community of immediate aim, before the Smathers Subcommittee, so far as the agricultural commodities exemption was concerned. The AAR's president complained that the exemption takes traffic away from "all regulated carriers"; and he reiterated, as noted above, his Association's desire for complete repeal of the exemption. The ATA president, with equal clarity, disavowed any such wish on the part of his federation. But the immediate goal of both organizations, vigorously expressed by their respective presidents, was the undoing of recent court decisions—a procedure justified as a return to the congressional intent of the statute. To this end, the AAR supported not only the ICC's farm-to-first-market measures (S. 1689 and H.R. 5823) but also Senator Smathers' roll-back bill, S. 2553. The ATA's approach to the matter was described by one of its witnesses as "on a commodity basis rather than basically a redefinition." That is, the ATA wanted Congress to list some specific commodities as being hereafter non-exempt, instead of attempting a roll-back by means of generalized language. It viewed those commodities—*e.g.,* frozen vegetables—as "industrially produced."[139]

One of the most persuasively-reasoned recent proposals for amending section 203(b)(6) of the Interstate Commerce Act was that of Milton Ratner,[140] a physician turned trucking-firm operator, who appeared on behalf of the ATA. Through him, the ATA asked for a roll-back as to seven commodities and commodity groups and also the prevention of "further widening" of the exemption. Language to accomplish these aims was not offered. Dr. Ratner described the list of seven products as a compromise; but criteria underlying the list were stated:[141]

> First, we felt that only commodities recently declared exempt by court order should be included. (This has been followed except for foreign wool, which is a special case.) Second, we decided that as a practical matter we would seek action only on products which were important from a tonnage basis. Third, we agreed that there should be a "transportation reason" for their regulation—that the transportation pattern for the commodity should be comparable to that of industrial products rather than like that of agri-

[138] *Id.* at 870-71, 1357, 1501.

[139] Highlights of the AAR position appear in *Hearings, supra* note 25, at 5-6, 23-25; highlights of the ATA position, in *id.* at 771, 861, 865.

[140] *Id.* at 880-85.

[141] *Id.* at 881-82.

cultural commodities. Fourth, we gave careful consideration to the extent of direct farmer financial or marketing interest in the products.

It was mainly the third criterion, the commodity's transportation characteristics, that gave this presentation more of the quality of economic analysis than was had by many of the other demands for narrowing the exemption. As regards raw shelled peanuts, for example, Dr. Ratner declared that about sixty-five per cent of the unshelled peanut crop moved into shelling plants in October and November, but that the movement of shelled peanuts from shelling plants to market involved only eleven per cent in the peak month.

Neither the location nor the purchases of firms manufacturing . . . edible products [from peanuts], or those which crush peanuts, change much from year to year. In this movement from shelling plants, there are none of the characteristics which require special flexibility. It is exactly the sort of transportation pattern which fits well into the operation of regulated carriers.[142]

The other commodities which he asked to be excluded from the exemption were frozen fruits and vegetables, frozen eggs, powdered milk, fresh and frozen dressed poultry (eviscerated and noneviscerated), redried tobacco, and imported wool. But only on frozen fruits and vegetables and imported wool did the ATA get its wish in the Transportation Act of 1958.

Two things are remarkable about the farm organizations' response to the demand by various segments of the transportation industry that the agricultural-commodities exemption be substantially reduced in scope. One is that there was nothing resembling a united policy or combined action on their part, despite the fact that such action by agriculture is truly formidable politically, especially if it be used simply for hold-the-line purposes rather than for positive action. Before the Smathers Subcommittee, agriculture appeared considerably less in agreement about the agricultural-commodities exemption than did the AAR and ATA—two organizations which, on sundry other issues, were decidedly in conflict.

Secondly—and this is probably a corollary of the first point—the typical position taken by a farm group was either to express mild concern,[143] or to focus on the particular commodity of direct interest to its constituency, or to do both. Because a truck traveling inbound is likely to haul a different commodity from what it has hauled outbound, it emphatically is the business of—let us say—fresh-fruit-and-vegetable shippers to see to it that dressed-poultry shippers have an abundant supply of trucks. Pudd'n'head Wilson wanted to own half of the dog he disliked, so that he could kill his half. Killing the inbound half of a trucking operation will cripple, if it does not kill, the outbound half.

An interesting combination of the freeze and roll-back ideas was embodied in three identical bills introduced in May 1958 by Representatives Byrne, of Illinois,

[142] *Id* at. 883.

[143] See, *e.g.*, the statement on behalf of the National Farmers' Union, in *Hearings*, *supra* note 25, at 1366.

Boyle, and Gray.[144] The amendment to section 203(b)(6) of the Interstate Commerce Act therein proposed would have added a proviso to the effect that the only commodities to be deemed exempt are those listed as such in Ruling 107 of March 19, 1958. Nothing was said about the nonexempt commodities listed in that ruling; so no twilight zone would have been created. But the ICC and the courts would hereafter have been precluded from treating any commodity as exempt if no question had arisen before March 19, 1958, as to its status and if it had, consequently, been omitted from Ruling 107. The amendment included a roll-back in the form of a further proviso that notwithstanding the first proviso, the exemption would not apply to frozen fruits, frozen berries, frozen vegetables, or imports.

A freeze and a roll-back were also embodied in the form of two provisos in a bill introduced in June 1958 by Representative Pillion.[145] The first proviso would have given congressional sanction to both the exempt and the nonexempt listings in Ruling 107; however, like the ICC's Bureau of Motor Carriers, he would have treated both parts of the list as nonexhaustive. Room was left for growth of both categories through (a) future litigation about existing commodities, not yet the subject of dispute, and (b) technological change. The second proviso specified that, notwithstanding Ruling 107, numerous commodities (named in the proviso) were to be deemed nonexempt.

The position of the National Agricultural Transportation League, of Florida, and the Perishable Commodity Carriers Association, Inc., of Texas, was that as regards their own traffic (the trucking of fresh fruits and vegetables), the exemption should be ended, not mended.[146] Senator Smathers styled this "the most exciting and revolutionary testimony that we have had."[147] The clientele of these truckers, however, made such a case for *flexible* truck service and the unlikelihood of such service if the exemption were abolished that the NATL and the PCCA substantially receded from their initial position. Instead, they proposed that the exemption remain intact during the first movement from field or orchard if the grower still owned the crop. This was a proposal of limited importance in the light of the NATL's testimony that, in Florida, most of the citrus fruit and much of the vegetable crop are sold in orchards and fields. At the same time, they proposed that, from the first market onward, the trucking of fresh fruits and vegetables be subject to ICC rate control and insurance requirements, but not subject to any requirement of a certificate of convenience and necessity or a permit. This meant continued freedom from ICC control over entry into the business and the routes or areas served.[148] This was an attempt to improve the truckers' income without reducing the adequacy or flexibility of service. As matters turned out, the 1958 amendment to section

[144] H.R. 12488, H.R. 12677, H.R. 12681, 85th Cong., 2d Sess. (1958).

[145] H.R. 12964, 85th Cong., 2d Sess. (1958).

[146] *Hearings, supra* note 25, at 977-78, 986-87, 989, 994, 1006-07; N.A.T.L. News, March 1958, pp. 4-7; *id.*, April-May 1958, pp. 6-7; *id.*, Nov. 1958, pp. 8-10.

[147] *Hearings, supra* note 25, at 988.

[148] *Id.* at 998-1000.

203(b)(6) of the Interstate Commerce Act did not in any way modify the exemption of fresh fruits and vegetables.

XII

THE 1958 AMENDMENT

There was little opposition in Congress to the enactment, in the Transportation Act of 1958, of provisions substantially restricting the agricultural-commodities exemption. Section 203(b)(6) of the Interstate Commerce Act was amended by adding two provisos at the end:[149]

> *Provided,* That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however,* That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products) . . . .

The political climate in which this amendment took shape may be judged by the fact that whichever house's version of the new exemption was narrower, on any given aspect, was accepted by the conference committee of the two houses of Congress.

The Commodity List (of exempt and nonexempt commodities) in Ruling 107 is incorporated by reference into the Interstate Commerce Act. This is not a delegation of authority to the ICC. It is only the March 19, 1958, version of the list that has the status of a statute; any subsequent changes in it by the ICC or its Bureau of Motor Carriers will have no statutory force without further action by Congress.

Then there are various products that had, as a result of litigation, been declared exempt but that are now returned to nonexempt status by being listed in the Act as outside the scope of the exemption. Most of these are listed in Ruling 107 as exempt. On the other hand, as concerns fish, the elaborate listing agrees with the notations of "exempt" and "nonexempt" in Ruling 107, with one very important exception: The statute shifts cooked fish from the nonexempt to the exempt list. This change was vigorously urged by the National Fisheries Institute.[150] Its traffic counsel said that it is so common to ship a mixed truckload of cooked fish in a frozen condition and frozen uncooked fish that, "if you regulate cooked frozen fish, it will result in the complete abolition of the exemption [as regards fish]."

[149] 72 Stat. 573, 49 U.S.C.A. § 303(b)(6) (Supp. 1958).
[150] *Hearings, supra* note 25, at 1502, 1504-07.

This would follow from the fact that the exemption in section 203(b)(6) of the Interstate Commerce Act applies only to a movement in which the entire truckload consists of exempt commodities. Indeed, the provisions in the 1958 amendment to that section as regards fish are pretty much what the energetic Fisheries Institute asked for. These provisions as to fish are the only part of the 1958 amendment which expands the exemption beyond the point to which its judicial interpretation had brought it.

Until Congress amended section 203(b)(6) of the Interstate Commerce Act in 1958, it had left to the ICC and the courts the task of deciding what specific commodities fell within the general terminology in the law—"ordinary livestock, fish . . . , or agricultural . . . commodities." Congress has now launched on a vast do-it-yourself project. When it decided about wool waste and pickled fish in 1958, it invited an endless series of such decisons in the future. Relieving Congress and state legislatures of tasks so detailed as this, however, was a basic idea underlying the creation of regulatory commissions in the past three-quarters of a century.

In part, such a function is still left to the ICC and the courts. Cumbersome though the revamped exemption is, it does not try to list all commodities that—although originating on the farm—are nonexempt. Neither does it seek to list all exempt commodities. It does not even list all conceivable commodities that might be called "fish." The House version of the 1958 amendment would have declared "products . . . containing seafood as the basic ingredient" to be within the exemption. Even without that language in the law, the ICC and the courts may still decide whether particular products are fishy enough to be within the exemption. Likewise, if a commodity is in some sense agricultural, but is not listed in Ruling 107 as exempt or nonexempt and not listed in the amended section 203(b)(6) of the Interstate Commerce Act itself as exempt or nonexempt, the ICC and the courts may still decide whether it is within the exemption. This is true alike of products already known to mankind and those still beyond the horizon.

There is another departure from the exemption as known from 1935 to 1958. Throughout that period, Congress stuck to the policy that all agricultural commodities were within the exemption. The boundary between what was agricultural and what was manufactured was the subject of judicial interpretation, but the basic principle was there. In the 1958 amendment, Congress excluded from the exemption some specified commodities (*e.g.*, bananas) which are unquestionably agricultural. Presumably they were excluded on some basis other than the distinction between agricultural and manufactured products. Some of the commodities thus excluded are not grown commercially in the continental United States. For wool alone, a distinction is introduced between the imported and the domestically-produced shares of a single commodity. But "No help for offshore farmers!" is not an avowed criterion in the amendment, nor did that point arise in debate. On the other hand, cooked fish had been held by the ICC's Bureau of Motor Carriers to be too highly processed for inclusion in the exemption; and yet, the amendment expressly included

it in the exemption. The 1958 version of the exemption expressly excludes frozen fruits and vegetables; but, by reference, it incorporates Ruling 107's recognition of fresh and frozen dressed poultry as exempt. In the exemption as it stood from 1935 to 1958, there was a principle; and principles, good or bad, can be defended. The remarkable mixture of odds and ends that now comprises section 203(b)(6) of the Interstate Commerce Act, however, will be hard, indeed, to defend.

The Transportation Act of 1958 provided grandfather rights. If any trucker was, throughout the period from May 1, 1958, to the Act's effective date, August 12, 1958, engaged on a particular route or in a specified territory in the interstate, for-hire trucking of an exempt commodity which the Act now made nonexempt, he was to be allowed to apply to the ICC for a certificate or permit to operate as a common or contract carrier (according to the type of operation) hauling that commodity and serving that route or territory. Upon the carrier's establishing to the Commission's satisfaction that it met these requirements, the ICC was required by the Act to grant the requested certificate or permit.[151] This sounds simple and automatic, but in practice is neither.[152] In any event, it is no source of new trucking service in the future. Any carrier, new or old, wishing to furnish new service will be subject to the usual requirements in regulated transportation: A common carrier must prove the public convenience and necessity of its proposed service; a contract carrier must prove that its proposed operation will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act.

XIII

A Direct Approach to Recovery of Traffic

For some years, the railroads' efforts at regaining traffic lost to their competitors had a strong accent on action through government. Thus, they, like the regulated motor carriers, have been parties to litigation concerning the scope of the agricultural-commodities exemption; the railroads were ardent advocates of the 1955 proposals of the Presidential Advisory Committee on Transport Policy;[153] and they have shown great energy and versatility in their demands for the abolition or substantial reduction of the scope of section 203(b)(6) of the Interstate Commerce Act. Then, on the eve of success in this last-named approach, they supplemented it by an increased use of a wholly different means of coping with the competition of exempt truckers—namely, efforts to heighten the attractiveness of railroad service and rates. For the sake of brevity, this might be called a direct approach as distinguished from one through government. As regards any particular kind of traffic, the respective shares hauled by truck and other carriers depend partly on the rules or lack of rules imposed by government and on the nature of the commodities and the marketing prob-

[151] 72 Stat. 573 (1958).

[152] *Hearings, supra* note 25, at 1505.

[153] The proposals were analyzed by the present author in U.S. Dep't of Agriculture, The Marketing and Transportation Situation, July 1955, pp. 17-29.

lems involved; but their shares depend also on the respective carriers' ability and willingness to make their services and rates satisfactory to shippers and receivers.

Late in 1957, one of the nation's larger railroads began piggyback service (the hauling of fully-loaded truck-trailers on flatcars) for fresh fruits and vegetables from the Lower Rio Grande Valley of Texas to St. Louis and Kansas City at rates competitive with those of the trucks. Piggyback, unlike conventional rail service, lacks the expense and delay of loading and unloading rail refrigerator cars from and to local trucks at origin and destination. For this railroad, the prompt result of lowered rates and improved service was a big shift of Lower Rio Grande Valley produce traffic from over-the-road trucks to piggyback.

A New England railroad was earning about one-third of its revenue by hauling Maine potatoes, and it also got substantial income from fertilizer on the back-haul. The rapid increase in the trucks' share of both kinds of traffic so worried the railroad's management that, in 1957, it worked out with connecting railroads a drastic rate reduction on Maine potato shipments within New England and to other eastern states, and a fifty per cent rate cut on fertilizer carried from Boston to Maine. For potatoes, the minimum load for a carload rate was raised from 36,000 to 50,000 pounds in order to lower the average cost per hundredweight per mile incurred by the railroads.[154]

In the rail transportation of fresh vegetables from California, Arizona, and the Southeast and of fresh citrus fruit from Florida, there likewise were recent rate changes designed to foster heavy loading and thus bring the railroads a lower average cost per hundredweight per mile and the shippers a lower average rate. Within a recent three-year period, rail transit time from California to New York City was reduced from ten to seven days.[155] If there were validity to the widespread conception of the Interstate Commerce Act as a device for insuring that the railroads, pinioned by regulation, lose their traffic to unregulated trucks, none of these things could have happened. But the ICC did not intervene with decisions that these various reduced rail rates were less than compensatory. Furthermore, any carrier's efforts at gaining traffic by improving its *service* is generally free of government control.

XIV

UNLIKELIHOOD OF AN AMENDMENT TO BROADEN

The agricultural exemptions in sections 203(b)(4a) and (5) of the Interstate Commerce Act are well enough accepted that there is little need for speculating about possible early changes in them. The exemption for private trucking done by farmers—section 203(b)(4a)—has no different economic or legal implications than exemptions accorded other private trucking, except that farmers engaged in private trucking are a rather unlikely type of law-evader, so far as concerns the ruse of

[154] Railway Age, May 5, 1958, p. 32.
[155] U.S. Dep't of Agriculture, Agricultural Marketing, Jan. 1959, p. 15.

engaging in allegedly private trucking when actually hauling for the general public. The persons most likely to be guilty of such violations are those who engage in trucking as a main source of livelihood. Farmers and other genuine nontruckers can legally do some for-hire trucking of nonagricultural commodities without operating authority from the ICC, if the transportation is "casual, occasional, or reciprocal."[156] As for the exemption accorded farmer co-operatives engaged in trucking, the transportation they provide for members and nonmembers is simply part of the large array of services rendered by the "farmers' business organizations," and—so far as public policy is concerned—it should stand or fall along with the rest of the array.

Any moderate broadening or narrowing of the agricultural-commodities exemption—section 203(b)(6) of the Interstate Commerce Act—would probably be within the framework of that section as it now stands. This means, for example, that if shippers or truckers are interested in a particular commodity which—expressly in the statute or by the reference therein to Ruling 107—is listed as an exempt or as a nonexempt commodity, they might try to get Congress to enact a law to shift this particular commodity to the opposite classification. There have been such bills in the past, but they ill suited an approach in terms of the broad distinction between agricultural and manufactured products that section 203(b)(6) of the Interstate Commerce Act embodied for twenty-three years. Since the 1958 amendment, however, it is perfectly reasonable to offer a bill to declare frozen dressed poultry nonexempt or a bill to declare frozen berries exempt. This is a prospect so chaotic that it defies analysis.

Had Congress been less intent on the problems of the railroads and more intent on the problems of shippers, it might well have left section 203(b)(6) of the Interstate Commerce Act exactly as it stood at the beginning of 1958. During the period leading up to the 1958 amendment, nothing new was said against or for exempt trucking; but its opponents were eloquent and hard-hitting, while most of its supporters other than the fisheries people were less emphatic. Hence, the agricultural part of this exemption was narrowed, and the part about fish was broadened.

If there was an opportunity early in 1958 to keep the exemption as it stood, the opportunity has been lost. Regardless of whether the 1957 version of the exemption, including the judicially-provided continuing-substantial-identity test, was sound public policy, adherents of that legal framework had best recognize that they can't go home again. A financially weak and politically strong farming interest in the days of the Grangers began this country's policy of governmental control of railroads. In 1935, such an interest achieved, on its own behalf, an agricultural exemption from federal control of trucks. If the farm community—a diminishing part of the population, percentagewise and in absolute numbers—again becomes as ailing financially and as strong politically as it was in 1935, it might persuade Congress to restore the exemption to its 1957 form. Apart from that contingency, the most fruitful

[156] 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(9) (1952).

kind of reflection about the exemption's future would seem to be: If this hybrid of 1958 were wiped out entirely and this segment of truck transportation were to be regulated, what should governmental policy be?

XV

AN ALTERNATIVE TO THE EXEMPTION

The characteristics of exempt trucking emphasized by shippers are a good lead as to what pattern of regulation ought to be developed for the now-exempt motor carriers if the agricultural-commodities exemption were abolished. Ready availability of trucks and flexibility as to when and where they go are much valued by shippers and receivers, particularly in the movement of perishable commodities that are fresh rather than frozen. The proposal of the National Agricultural Transportation League and of the Perishable Commodity Carriers Association for ICC rate control without ICC control over entry into the business would not make trucking service any less available or less flexible, and it might make trucks even more available than they are under the exemption—if the coveted ICC rate regulation did, indeed, substantially raise the rate level. This last, however, is improbable. A governmental attempt to set minimum or exact rates is foredoomed to failure if the government has no control over entry into the business. As soon as the rates are raised, outsiders are likely to think it worthwhile to enter the trucking business. With uncontrolled entry into the business, competition would be so keen that no number of enforcement officers that the regulatory body is likely to possess would suffice to compel the truckers to keep their rates up to the legal minimum, if that were substantially above the level that would exist in the absence of regulation.

The argument that exempt trucking service is flexible and regulated service is not stems from bad experiences, and not from doctrinaire preconceptions about the stifling effect of bureaucracy. The transportation history of the Florida frozen-orange-juice-concentrate industry in its first decade was a case in point. From meager beginnings in 1945-46, the industry grew rapidly. By the 1948-49 season, the concentrate-processing industry was perturbed over the inadequate supply of rail refrigerator cars that could provide the low temperatures regarded as necessary to preserve the product in marketable condition. To meet this standard, mechanically-refrigerated cars were needed, not the ice-and-salt cars that the railroads offered. The commodity was deemed by the ICC to be manufactured, not agricultural; so the industry encouraged motor carriers to apply to the Commission for operating authority to haul frozen orange juice concentrate from Florida to northern destinations, if they possessed or were willing to buy mechanically-refrigerated trucks. Such authority was granted—usually on only a temporary basis at the outset.

In the ensuing years, there was a protracted and intense rivalry between the railroads and the trucking firms, and among the latter, not merely in the form of direct competition for concentrate to haul, but also in the ICC arena. The frozen-orange-juice-concentrate industry was rapidly expanding the number of its processing plants

and customers; plants and customers were increasingly dispersed; and there were numerous split pickups and split deliveries in the transportation of the product. Hence, the industry and the motor carriers favored ICC motor-carrier certificates of convenience and necessity with all of Florida named as the origin and the entirety of one or more states as the destination.

The ICC showed marked solicitude for the railroads in a variety of ways. In issuing motor-carrier certificates, especially on a permanent basis, it followed the practice of naming specific points as the origins. A similar policy was followed as regards destinations, although less persistently.[157] After prolonged controversy, the ICC, in 1956, made an apparent change in policy by granting state-wide origins and destinations for concentrate to a number of motor carriers.[158] Meanwhile, however, not only were the trucks handicapped in their competition with railroads, but shippers trying to develop the market for their product, had less adequate transportation than the trucks were willing and physically able to furnish.

The National Fisheries Institute, Inc., is described by its traffic counsel as a "national organization of fishermen, producers, distributors, wholesalers, everyone that is connected with the fishery industry." The industry relies heavily on exempt interstate trucking. The Institute strongly criticizes the ICC in these terms:[159]

> We are convinced that the services being performed by our present exempt carriers could not be duplicated by carriers operating under existing ICC regulations. The Commission's policy of restricting carriers' certificates to specific commodities, limited origin and destination points, and specified routes, would act as a serious deterrent to the flexibility required. Our industry is continually *developing new and improved products and expanding its markets and distribution points* in an effort to increase the per capita consumption of seafoods. Our carriers, therefore, require flexibility in the commodities to be hauled, points to be served, and the routes over which they may operate.

There are motor carriers of household goods who have ICC operating authority to make any interstate haul in the United States. If a breadth of authority something like this were to become available in the regulated trucking of agricultural commodities, much of the argument for the agricultural exemption would be vitiated. But would the ICC choose to grant such authority? If there are to be special provisions as to the regulation of truck transportation of agricultural commodities, it would be desirable to include in the statute a requirement that permits and certificates of convenience and necessity for the trucking of these commodities include state-wide origins and destinations, with "state-wide" defined to include one or more whole states.

Certificates for irregular-route service on a radial or nonradial basis are what the National Agricultural Transportation League and the Perishable Commodity Carriers Association advocated in their initial proposal for ICC regulation of fresh-fruit-

[157] MARGARET R. PURCELL, TRANSPORTATION OF FLORIDA FROZEN ORANGE JUICE CONCENTRATE 26-27, 30-36 (U.S. Dep't of Agriculture Research Rep. No. AMS-50, 1955).

[158] Traffic World, Feb. 11, 1956, pp. 46-47. U.S. Dep't of Agriculture, The Marketing and Transportation Situation, Oct. 1956, p. 45.

[159] *Hearings, supra* note 25, at 1505. (Emphasis added.)

and-vegetable truckers. At all events, this was the type of certificate that they hoped the ICC would grant, on a grandfather-rights basis, to the carriers already engaged in produce trucking.[160] They did not say what type of certificate would be appropriate for newcomers to the business or for old-timers who want to expand.

But flexibility as to routes is by no means the only sort of flexibility needed. "Convenience foods," known also as foods with built-in maid service, may be viewed by many of us with boredom or downright hostility; but, the supermarkets, nevertheless, are stocked with such things as fried potatoes that need only to be thawed out and heated before being eaten. In many ways, the marketing of the farmer's crop or the fisherman's catch is a process which evolves so rapidly that it is served poorly by transportation that is subject to narrow definitions as to what the carrier may haul. Any legislation for the economic regulation of trucking that is now exempt should lay down the principle that the delimitation of hitherto-exempt commodities in any given certificate or permit for hauling must be in broad terms. Congress would have to show profound ingenuity to phrase this requirement so as to outwit the regulatory body that imported the channels-of-commerce principle into the agricultural exemption; but the effort is worth making.

If flexibility on these several counts is not built into whatever scheme of regulation is proposed for the now-exempt trucking of agricultural commodities, the exemption should stand, patchwork though it has been since 1958. It does at least have the merit of allowing good transportation service for the commodities that it covers.

Rate regulation of trucks is a less likely source of trouble for agricultural shippers than is the control over who shall engage in the business of trucking, what he shall haul, and where. Furthermore, the potential danger in the regulation of trucking rates is probably not greatly different in the trucking of agricultural commodities (no matter how defined), from that in the trucking of other things. A proposal was advanced a few years ago that each ICC-regulated common carrier (by highway, rail, or other mode) be allowed to charge, for hauling any given commodity between any given points, a rate lying anywhere within a "zone of reasonableness."[161] The lower limit of this zone would be the out-of-pocket cost. The contemplated upper limit apparently was the fully-distributed cost (both direct and indirect costs, and both fixed and variable costs). At its discretion, the carrier could change its tariff from time to time within this zone. Because railroads have a lower ratio of out-of-pocket cost to fully-distributed cost than do trucks, such a formula would be useful to railroads in acquiring the traffic of the truck lines in any given area (if the trucks were all regulated) by the railroads' charging less than the lowest permissible truck rate long enough to put all truck lines in that area out of business. Then another area

[160] *Id.* at 978, 1007.

[161] Analyzed in U.S. Dep't of Agriculture, The Marketing and Transportation Situation, July 1955, pp. 20-22. See *Hearings Before the Subcommittee on Transportation and Communications of the House Committee on Interstate and Foreign Commerce on Transportation Policy*, 84th Cong., 2d Sess., pt. 1, at 177-78 (1956).

could be turned to. It would be crucial as to whether any such change as this in the governmentally defined rate-making rules would be initiated along with the abolition of the agricultural exemption in trucking. The extension of rate regulation to the trucking of agricultural commodities would be relatively harmless only in the absence of all such changes in the *character* of rate regulation.

If the agricultural exemption is to be replaced by ICC economic regulation, one of the most sorely needed features of the new scheme of things, if the newly-regulated truck transportation is to be adequately useful, is not attainable by act of Congress. This feature would be a lessened preoccupation of the Commission with the problems of the railroads. An increased preoccupation with the problems of shippers might, for example, result in a less restrictive approach to the granting of certificates and permits to motor-carrier applicants.

It is not tenable to say that all the exemptions of interstate, for-hire transportation from federal regulation should stand or fall together. It is conceivable, for instance, that agricultural commodities merit no exemption from the motor-carrier part of the Interstate Commerce Act, but that newspapers do. The excitement in recent years about the former exemptions, however, has been accompanied by a remarkable silence about the latter. If the divergence in reaction reflects a difference in the volume of freight involved, that explanation does not carry over to the fact that there has been considerably less complaint about the economic exemptions under the water-carrier part of the Interstate Commerce Act than about its section 203(b)(6). The substantial percentage of interstate water traffic that is exempt is presumably a source of lower average revenue per ton to the carriers than is the motor-carrier counterpart. The railroads' comparatively muted criticism[162] of exempt water transport may well become more vigorous if and when all interstate, for-hire trucking of agricultural commodities has been brought under economic regulation.

While there may be sound reasons why some of the various exemptions of for-hire transportation from federal regulation should be retained and others abolished, there is no reason why the various exemptions should be reconsidered by Congress piecemeal. Surface transportation of freight is so competitive among modes of transport that the various exemptions, if they are to be reappraised by Congress, should all be reappraised at one time. Only thus will legislation to change the boundary between the regulated and the exempt be able to avert the substitution of a new set of anomalies for the old. Such a reappraisal should be comprehensive not only as to the modes of transport investigated, but also by considering the stake of labor, as well as of carriers and shippers, in the nation's transportation system.

[162] *Hearings, supra* note 25, at 5.

COMMERCIAL CARRIAGE AND MILITARY TRAFFIC*

Gilmer B. Randolph†

Since the military traffic is the largest singly-controlled traffic volume in the United States, and since it is vital to national defense, its interests are, in a sense, the interests of all. However, this fact only comes home to all, we know, when things go badly. Today, of course, it is the responsibility of the planners and traffic managers to insure that things do not go badly in the event of some future emergency.

Evaluation of this responsibility can well begin with the simple question: Is the country ready, transportationwise, for national emergency and war? In the answer to this question, it must be recognized that defense industry and others move a great deal of traffic vital to national defense under other than direct military proprietorship or sponsorship. This article, however, seeks to deal primarily with the actual military traffic aspect of national defense.

The essence of movement is dynamics; military traffic is no exception. The massive potential inherent in millions of shipments, millions of tons, and millions of passengers is not a passive lump of substance to "pick up, paint, or salute." Any experienced traffic manager worth his salt knows that traffic management becomes a definite ingredient of the traffic itself; similarly, management is an ingredient of traffic management. For this reason, the writer has tried to draw some brief typical sketches of both the mechanics and the principles of military traffic management, and to discuss some of the legal and technical matters peculiar to government transportation. The writer has also made so bold as to philosophize on one or two of the national transportation problems which seem to have an effect on transportation as a whole, and so inevitably on national defense.

I

The Military Role of Commercial Transportation

The Trojan horse and Hannibal's elephants are well-known classical examples of military transportation. Today—and perhaps then—they might be called "organic transportation"—that is, they were part of the organizations they were moving. At least, they would surely fall in the category of "military-owned," for we know from Homer that Agamemnon's soldiers built the Trojan horse, and almost certainly Hannibal's elephants were not hired to him for some carrier's profit.

* The views expressed herein are those of the author and do not necessarily reflect the views of the Department of Defense.

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This military ownership is a common attribute of battlefront transportation today, just as in Hannibal's time. In the case of our country, however, this does not hold true for the home front—the United States proper—the sometime "Zone of the Interior." The activities of the Military Traffic Management Agency are confined to the continental United States, excluding Alaska; and this article will be similarly limited. In this area, commercial transportation—transportation for hire—reigns supreme in military usage, as will be seen clearly in a later section.

This reliance on commercial transportation for military traffic not only is rooted in traditional practice, but enjoys the matchless rationale of common sense. Moreover, it has worked well when properly controlled, although it does offer certain challenges to the military traffic manager that so-called "private carriage" by military-owned vehicles would not offer.

On still another hand, our reliance on commercial transportation in the United States permits us to escape the particular type of attack which falls the lot of the Military Air Transport Service and the Military Sea Transportation Service because of the extent to which they are obliged to employ aircraft and ships owned by the Government. The problems facing those organizations in operating overseas are obviously quite different in some respects from those of the MTMA.

During World War I, war-supporting transportation did bog down, but survived to do the job. Substantially all transportation was by rail, and lack of control caused the trouble. The details are sordid and unpleasant: cars backed up from New York to Pittsburgh; turn-around time reached fantastic lengths; expeditors crawled under cars in jammed railroad yards to search for precious critical cargo. Operation of the railroads by the federal government marked an era to which no responsible party has shown any desire to return. Controls aimed at keeping ports and transportation systems fluid were imposed—too little and too late, but useful enough to help clear up the difficulty and providing many lessons.

Performance in World War II was a different story; a far greater potential for calamity was present, but the lessons were well remembered. Determination and alertness to the dangers of transportation congestion and chaos caused incisive measures to be taken fairly early. The War Department devised controls of its own military portbound traffic and imposed them about the time the Lend-Lease Act[1] was enacted, almost a year before the country was at war. That Act generated large amounts of military-type traffic and thereby provided valuable experience in keeping facilities fluid. The Office of Defense Transportation approached with outstanding vigor and success the problem of maintaining an effective, well-utilized transportation system in the United States. Measures substantially similar to those of World War II solved the acute problems presented by the Korean conflict.

Responsibility for the commercial transportation aspects of national defense in the United States is widely vested; the principal focal points, of course, are the Interstate Commerce Commission, the Federal Aviation Agency, and the Office of Civil

[1] 55 Stat. 31 (1941), 22 U.S.C. §§ 411-13 (1952).

and Defense Mobilization. The ICC and the FAA regulate and promote transportation under specific statutes and administer, respectively, the Interstate Commerce Act[2] and the Federal Aviation Act of 1958.[3] The OC&DM, as its name implies, has much broader functions than those two principal regulatory bodies. This article does not undertake to discuss specifically the functions of the three agencies named, nor of the several other federal agencies whose activities impinge on commercial transportation for military traffic.

Actions which affect the national defense effectiveness of American commercial transportation are taken in literally thousands of quarters: by states, counties, municipalities; by the Congress and a number of federal agencies; by hundreds of supply and service industries; by technologists, scientists, and researchers; by shippers, carriers, receivers, and travelers; by economists, lawyers, and other crafts and professions; and so on, almost ad infinitum. In short, the whole of the country, knowingly or not, is furthering or hindering—or perhaps changing—national transportation policy.[4]

Originally, federal regulation of transportation in the United States was designed to protect users from abuses which had accompanied the early power and philosophy of railroads. In the last several decades, statutory regulation has increasingly accented the preservation and health of the transportation industry itself. Doubtless this evolution stems from the fact that transportation has become increasingly vital in our national life. It has become more vital, apparently, because the individual has become more dependent on American mass production and less self-sufficient. Every technological advance that contributes to our standard of living automatically calls for more transportation; or, expressed differently, the average American has developed an absolute requirement for so many thousand ton-miles of freight transportation a year, including a fraction of all the transporation used by industry and commerce. Similarly, he requires passenger transportation, but this requirement varies more from person to person.

[2] 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1-1185 (1952).

[3] 72 Stat. 737, 49 U.S.C.A. §§ 1301-542 (Supp. 1958).

[4] One congressional statement of the National Transportation Policy is in these terms: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Note preceding 49 U.S.C. §§ 1, 301, 901, and 1001 (1952). Compare the declaration of policy in the Federal Aviation Act of 1958, 72 Stat. 740, 49 U.S.C.A. § 1302 (Supp. 1958). It should be borne in mind that "national defense," of which these policy statements speak, is a far broader term than "military traffic." The former includes a great deal of public and industrial use of transport beyond the use by the four military services.

Congress has recognized that national defense and all else will fall if our transportation industry falls and, therefore, has increasingly developed the "fostering" theme. States and, to some extent, other political subdivisions regulate carriers in a variety of ways and degrees, much state regulation being patterned after federal regulation. Summed up in simplest terms, the commercial transportation industry with which military traffic managers deal, and upon which they are committed to rely, is regulated with firmness and in considerable detail. The regulation applies to economics, to safety, and to the right to operate. This regulated industry is vital to national defense and, more specifically, to military traffic.

The distinction between the government as a regulator of transportation and as a user of transportation seems broad, deep, and plain. Of course, this dual role creates some peculiar problems and pitfalls for the government traffic manager—not the least of which is that of treading the often-narrow line whereon he may properly protect the interests of the taxpayer, adhere to procurement laws, and remain in statesmanlike comity with the regulative policies and agencies of the government. This difficulty may become more evident in succeeding sections of this article.

II

MANAGEMENT OF MILITARY TRAFFIC

A. The Managerial Establishment

Before the establishment of the MTMA, each of the four military services—Army, Navy, Air Force, and Marine Corps—managed its own traffic. That this traffic was of significant magnitude is indicated by the fact that direct annual payments by the military services to commercial carriers in the United States amounted to more than $500,000,000 for moving about 24,000,000 tons of freight, and to more than $100,000,000 for transportation of some 4,500,000 passengers. This does not include additional transportation costs, not susceptible of ready calculation, which are borne by the military services but are not paid directly by them to carriers. Such costs are incurred in purchasing f.o.b. destination, in reimbursable-cost contracts, in travel allowances, and in certain other ways.

The movements of passengers and shipments of property which incur this $500,000,000 in charges are dispatched by more than 1,000 military activities and thousands of civilian contractors. The quantitative predominance of the Army traffic and other factors caused the Secretary of Defense to designate the Secretary of the Army as single manager for traffic management.[5] The Department of Defense

[5] DOD Directive 5160.14, 21 Fed. Reg. 4355 (1956). The purposes of this assignment were stated to be:

"1. To provide the most effective and economical freight and passenger transportation service for the Armed Services from commercial transportation companies (including rail, highway, air, inland waterway, coastwise and intercoastal carriers) operating between points within the United States (reference to coastwise and intercoastal commercial transportation is not intended to affect those responsibilities for ocean carrier functions assigned to MSTS, but has reference to the traffic management authority necessary to determine the proper mode of shipment).

"2. To eliminate duplication and overlapping of effort between and among military departments.

"3. To apply to the functions of traffic management within the Department of Defense the basic

directive specified that the MTMA would be established to carry out the single-manager operational responsibilities.[6]

The establishment of the MTMA became a significant accomplishment in the execution of the Secretary of Defense's responsibility under the National Security Act of 1947[7] to "take appropriate steps to eliminate unnecessary duplication or overlapping in the fields of . . . transportation." In terms of offices performing military traffic management, this reform meant that the number of field establishments engaged in this activity was reduced from sixteen to six, and the number of headquarters from five to one.[8] Manpower has been reduced by about one third; the MTMA is jointly staffed with military personnel of the Army, Navy, Air Force, and Marine Corps, and with civilian employees who, predominantly, were formerly employed by the four military services in their field and headquarters traffic-management offices. Some key positions are occupied by military officer personnel and some by civilians in an established staffing pattern; the ratio of military to civilian personnel is about one to eleven.

B. Principles of Management

The MTMA is charged with three kinds of functions:[9] (a) management, (b) cost, and (c) service. While there has long been considerable public understanding of the cost and service functions of a traffic manager, only in recent years has knowledge spread about the role of the traffic manager in management decisions of industry; the same is generally true of government traffic management. The traffic manager's ability to do a full job has benefited, no doubt, from intensified competition which has caused industrial management to explore deeper its own potential to improve operational efficiency, serve customers better, and make profits.

Helpful in increasing efficiency have been the excellent publicity and analyses of traffic management which have been sponsored nationally by certain carriers and by such publications as Dun's Review and Modern Industry, which has published the result of a series of surveys of several hundred industries with respect to traffic man-

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pattern of all organizations performing a multiple-service support mission, as prescribed in DOD Directive 5160.12.

"4. To assure under all conditions, efficiency and economy within the Department of Defense in the procurement, use, cost and control of commercial transportation services required by military agencies for the movement of freight and passengers between points within the United States.

"5. To effectively develop plans to assure efficient use and control of commercial transportation resources utilized by the military within the United States in support of types of military missions.

"6. To assure adequate practical training for military personnel to fit them for traffic management assignments at posts, camps and stations within the United States, and in overseas areas."

[6] *Ibid.*

[7] 61 Stat. 500, 5 U.S.C. § 171 (1952).

[8] The Army had four Zone Transportation Offices; the Navy, five Navy Central Freight Control Offices; the Air Force, four District Traffic Offices; and the Marine Corps, a Freight Control Office. Each had one traffic management headquarters in Washington, and the Air Force had the equivalent of a traffic-management headquarters at Headquarters, Air Materiel Command, Dayton, Ohio. Today, the Military Traffic Management Agency has Regional Traffic Offices at Pittsburgh (with branch at Brooklyn), Atlanta, St. Louis, Dallas, and Oakland, California.

[9] Note 5 *supra*.

agement, together with significant individual experiences and approaches.[10] In general, these surveys show that industry's use of traffic management, while improving, is as much a model for weakness as for strength. The MTMA is trying to profit as much as possible from the experience of industry in traffic management, as well as from its own experience.[11]

Primarily, military traffic management is carried out by providing service and management to and through the more than 1,000 shipping activities of the four military services. The MTMA originates no military traffic except its own housekeeping travel of insignificant volume. Stated in highly simplified form, its traffic management is exercised through: (1) regulations (and enforcement thereof); (2) guidance; (3) servicing or control for individual movements or patterns; (4) negotiations and litigation; and (5) coordination with logistical systems. The structure of the MTMA and its allocation of functions can be briefly outlined as follows:

1. Traffic-management operations performed at base or depot level without reference to MTMA region:

   Arrange passenger transportation for individuals and groups of not over fourteen.

   Route shipments under 10,000 pounds via surface freight (in certain cases, the local transportation officer may select from several prescribed carriers).

   Route express and air shipments under 1,000 pounds.

   Arrange shipment of household goods (regardless of weight).

[10] Blake, *Traffic Management: Gold Mine in Transit,* Dun's Review & Modern Industry, March 1955, p. 59; *Better Transportation: Pathway to Profits, id.,* June 1957, p. 65; Kenny & Heyel, *Goods on the Move: New Horizons in Transportaiton, id.,* June 1958, p. 63; *Integrating Your Transportation for Profit, id.,* June 1959, p. 60.

[11] The Executive Director of the Military Traffic Management Agency, Major General I. Sewell Morris, has appointed an advisory panel to assist him in providing optimum traffic management for the Department of Defense in peace and war. This panel represents a wealth of broad and varied transportation experience, comprising the following members:

Walter F. Carey, President, Automobile Carriers, Inc. Past Vice President and General Manager of the Motor Car Transport Company; organized and became President of Commercial Carriers, Inc., in 1934; served as consultant to the Transportation Corps during World War II; was elected First Vice-President of the American Trucking Associations in 1952, President in 1953, Chairman of the Board in 1954; elected President of the National Defense Transportation Association in 1959.

William Thomas Faircy, Retired, Chairman of the Board, Association of American Railroads. Engaged in legal practice for various railroads, advancing to Vice-President and General Counsel of the Chicago & Northwestern Railroad; became President of the Association of American Railroads in 1947.

Morris Forgash, President, United States Freight Company since 1941. Joined Universal Carloading & Distributing Company in 1916; became General Manager in 1929; was appointed Traffic Assistant to the President of the U. S. Freight Company and its subsidiaries in 1931.

John Monroe Johnson, Executive Assistant, Atlantic Coast Line Railroad since 1956. Served as Colonel, U. S. Army, World War I; Assistant Secretary of Commerce, 1935-40; Member, ICC, 1940-56, and served as Chairman in 1950, 1953-54; was appointed Director, Office of Defense Transportation in 1944.

Edmund C. R. Lasher, President, North American Car Corporation. Transportation Officer of the Eighth U. S. Army in Korea in 1950-51; Commandant, Transportation School, Fort Eustis, Virginia, 1951-54; Assistant Chief of Transportation (Traffic), 1954-56; first Executive Director for Traffic Management, MTMA, 1956-58; retired as Major General, United States Army, Jan. 31, 1958.

Stuart Guy Tipton, President, Air Transport Association since 1955. Engaged as an attorney in the office of the General Counsel of the Treasury Department, 1935-38; was with the CAA, 1938-40; served as Assistant General Counsel, CAB, 1940-43; was General Counsel of the Air Transport Association 1944-55.

In emergency, ship any quantity of freight or passengers, and report later.

Routing of Air Force bulk liquids delegated to Air Force District Petroleum Offices.

Routing of perishable subsistence delegated to the Military Subsistence Supply Agency.

2. Principal traffic-management activities carried out by MTMA regions:

Routing of shipments of 10,000 pounds and over.[12]

Control of export traffic.

Expediting important shipments, including clearance of oversize/overweight items.

Arranging air and express movements (1000 pounds and over).

Quotation of freight rates for procurement.

Review of bills of lading.

Assistance to Installation Transportation Officers.

Management of tank cars and other Department of Defense rail equipment in interchange service (Central Traffic Region only).

3. Principal traffic-management activities managed at MTMA headquarters:

Arrangement of group passenger movements (15 or more).

Negotation of Joint Military Passenger Agreements.

Analysis and negotiation of freight rates, classification ratings and transit arrangements.

Freight classification guide system.

Household goods program.

Insuring transportability of missiles and other special items.

Loss and damage prevention program.

Development of improved methods and new techniques.

Liaison with military departments.

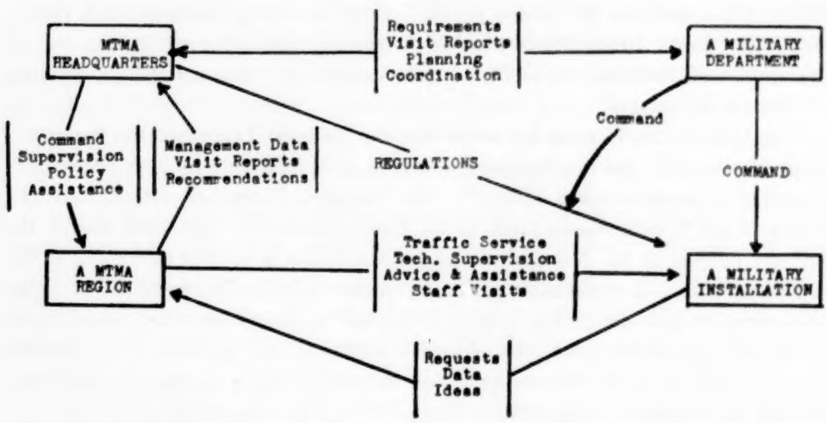
Support to regions in carrying out their traffic-management responsibilities.

The rudimentary chart shown below will suffice to indicate the rough outlines of operational military traffic management, omitting many staff and advisory aspects. This shows the relationship among four principal elements: military installations, MTMA regional offices, MTMA headquarters, and military departmental headquarters.

The most important principles in military traffic management are responsiveness to military requirements and optimum effectiveness in peace, emergency, or war—to wit, readiness. Certain phases of readiness will be discussed in a later section on Mobilization Considerations. Another outstanding principle of military traffic man-

[12] Cut-off at the 10,000-lb. level enables the MTMA to manage directly on a shipment-by-shipment basis about 71% of the freight dollars and 94% of the freight tonnage, while dealing with only about 18% of the shipments. By judicious use of repetitive route orders and other devices, the latter is further reduced to the equivalent of about 9% in terms of workload.

MILITARY TRAFFIC MANAGEMENT



agement in the United States is the use of commercial carriers.[13] Ancillary to this principle is the policy that "the economic resources of the Department of Defense inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry."[14]

In the selection of modes of transportation and individual carriers for military movements, three general considerations prevail, in the following order: (1) service (responsive to the military need), (2) cost, and (3) equitable distribution.[15] The least costly means of transportation shall be selected that will meet military requirements and be consistent with the objectives of governing procurement regulations and with the transportation policies expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation. However, if a prior factual determination has been made that expedited delivery will result in greater over-all economies through a reduction of in-transit or stored supplies, a more costly means of transportation may be employed if necessary to carry out the expedited delivery. "In view of the military's reliance during periods of mobilization or war on all modes of transportation, preferential consideration in the routine procurement of transportation will not be accorded one mode of transportation as against another."[16]

It is often urged upon the Department of Defense that cost considerations should be waived, not simply in favor of service which properly meets the military require-

[13] The Department of Defense policy on this point is: Commercial transportation service will be employed for the movement of personnel or things when such service is available or readily obtainable and satisfactorily capable of meeting military requirements. DOD Directive 4500.9, General Transportation and Traffic Management Policies, Jan. 6, 1956.

[14] *Ibid.*

[15] DOD Instruction 4525.3, Routing of Domestic Freight Traffic, Feb. 2, 1956.

[16] DOD Directive 4500.9, General Transportation and Traffic Management Policies, Jan. 6, 1956.

ments, but so as to "recognize and preserve the inherent advantages" of the mode of transportation being advocated. This advocacy presses the National Transportation Policy, which employs the quoted phrase,[17] as an impelling reason for such preference. One factor frequently overlooked in making this argument is that cost of operation, and, therefore, the ability to make competitive rates, is itself one measure of inherent advantages.

The Comptroller General has stated that the National Transportation Policy is a guide for the ICC and not for implementation or enforcement by government procurement or transportation officers.[18] The Supreme Court has characterized the Policy as the "Commission's guide to the public interest."[19] But, even though the primary purpose of the National Transportation Policy is to serve as a guide to the regulatory bodies in administering transportation laws, this declaration by Congress also serves to give the parties directly concerned an insight into the congressional intent which underlies those laws. In this connection, it is the policy of the Department of Defense to procure transportation services in such a manner as not to contravene the National Transportation Policy.[20]

C. Procurement of Transportation

The basic law underlying purchasing by the military services is the Armed Services Procurement Act,[21] upon which, in turn, the Armed Services Procurement Regulations[22] are based. In general, the Act and the Regulations provide for cost competition, even when the formal advertising method of procurement is not used. A specialized treatment of government transportation procurement appeared in a statute predecessor to the Act,[23] and it is referred to in a proviso of section 321(a), part two, title three of the Transportation Act of 1940, in these words:[24]

> *Provided further,* that section 5 of Title 41 shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

Expressed in brief, the situation today is that transportation for the military services need not be advertised for procurement, but may be so advertised if circumstances warrant, and that, when transportation is bought on the open market, cost and competition are for consideration.

The United States Government uses two principal forms of procurement instruments for buying transportation from commercial carriers: Standard Form 1103,

[17] See the National Transportation Policy, as quoted in note 4 *supra.*

[18] Comp. Gen. unpublished decision No. B-102080, April 13, 1951.

[19] McLean Trucking Co. v. United States, 321 U.S. 67 (1944); ICC v. Parker, 326 U.S. 60 (1945).

[20] DOD Directive 4500.9, General Transportation and Traffic Management Policies, Jan. 6, 1956: ". . . the Department of Defense will be guided by and pursue policies which will not contravene the National Transportation Policy. . . ."

[21] 62 Stat. 21 (1948), 41 U.S.C. § 151 (1952); 70A Stat. 127 (1956), 10 U.S.C. §§ 2301-14 (Supp. V, 1958).

[22] 32 C.F.R. §§ 1.100-1.609 (1955).

[23] 12 Stat. 220, as amended, 41 U.S.C. § 5 (1952).

[24] 54 Stat. 954, 49 U.S.C. § 65(a) (1952).

Government Bill of Lading; and Standard Form 1169, Transportation Request. A series of associated standard forms are used for continuation sheets, vouchers (bills to the government disbursing officers), and related purposes. The government bill of lading is used for transportation of property; the transportation request, to procure tickets for passenger travel. These standard forms are Government-wide and are prescribed by the Comptroller General of the United States.[25]

D. Control Over Expenditures

The Comptroller General directs and controls the General Accounting Office, whose general function is to assure the propriety of government expenditures. Both are independent of the executive branch of the Government, and were created by and report to Congress. As already noted, the Comptroller General prescribes certain standard forms for transportation; and he also promulgates basic regulations for the use of these forms.[26] For the armed services, these regulations are expanded and implemented by Military Traffic Management Regulations, which are prepared by the MTMA and issued over the command lines of the four military services. The GAO performs a postpayment audit of payments for transportation and makes any settlements and adjustments necessary.[27]

Before 1940, the preaudit of carriers' bills had been a fairly general government practice; but with the increased movement of freight and passengers which preceded World War II, preaudit backlogs occurred. In order to get their money faster, the carriers sought and obtained the enactment of title three, part two, section 322 of the

[25] The government bill of lading serves several purposes for which industrial shippers often prepare other papers besides the commercial bill of lading upon which they ship property. The original of the government bill of lading is sent from the consignor, who has obtained the originating carrier's receipt upon the form, to the consignee, who completes a receipt incorporated in the document and turns it over to the delivering carrier. The delivering carrier uses the original bill of lading to support his charge, which he bills to the disbursing officer named on the bill of lading. The government transportation request is a punch-card form that is surrendered to the carrier's agent when the tickets are procured. The carrier bills his charges to the disbursing officer named on the transportation request. Within the United States, it has long been the rule that the Government does not prepay transportation charges paid directly to commercial carriers. This stems from a time-honored statute which provides, in pertinent part, that:

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment." 60 Stat. 809 (1946), 31 U.S.C. § 529 (1952). This prohibition against government prepayment of the charges has not prevented the use of the transportation request procedure for buying tickets, which constitute a redeemable entitlement to transportation rather than transportation itself. Also, this statute has not prevented the prepayment of packages in the United States mail.

[26] "The Comptroller General shall prescribe the forms, systems, and procedure . . . for the administrative examination of . . . claims against the United States." 42 Stat. 25 (1921), 31 U.S.C. § 49 (1952).

[27] 42 Stat. 24 (1921), 31 U.S.C. § 71 (1952). "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Transportation Act of 1940.[28] There has been some controversy over whether that section will permit a rate audit of bills before payment if such audit is *not* performed by the GAO; but this has proved only of academic interest, because the practical effect of section 322—coupled with a certain enabling provision of the Certifying and Disbursing Officers Relief Act enacted in 1941[29]—has been the discontinuance of rate preaudits on government transportation bills.

These developments, plus the huge wartime volume of transportation bills (for instance, as high as 12,000,000 shipments for the armed forces in one year), led ultimately to an investigation by a congressional committee in the Eightieth Congress[30] and to improvements in the audit system. The extent to which the carriers may have taken undue advantage of the liberality of section 322 has been, of course, conjectural and controversial. In appraising the question of payment of carriers' bills before an audit has been made, it should be recalled that any recoupments of overpayments to the carriers must be accomplished within certain time limits if they are to be available to the department to which they were originally appropriated, either for re-obligation or re-expenditure.

The MTMA, in close cooperation with military disbursement offices and the GAO, has installed certain systems and procedures termed a "management audit," wherein is employed the electronic file computer in MTMA headquarters to disclose significant discrepancies between the advance calculation of cost for a freight shipment and the amount actually paid to the carriers. This management audit makes a second use of freight rates which have been ascertained in MTMA regional offices when the shipment is routed, and it helps to reconcile the rating and routing activities in shipping with the GAO's postpayment rate work. Quite apart from the moneys returned for use, this procedure offers valuable dividends in "preventive management," which the MTMA is exploiting intensively.

[28] The portion of this section here pertinent reads as follows:

"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Çivil Aeronautics Act of 1938, shall be made upon presentation of bills therefor prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharges by any such carrier from any amount subsequently found to be due such carrier. The term 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of the Interstate Commerce Act. . . ." 54 Stat. 955 (1940), as amended, 72 Stat. 860, 49 U.S.C.A. § 66 (Supp. 1958). The remainder of the section deals with statutes of limitations.

[29] "Provided further, That the Comptroller General shall relieve such certifying officer or employee of liability for an overpayment for transportation services made to any common carrier covered by title III, part II, section 322, of the Transportation Act of 1940, approved September 18, 1940, whenever he finds that the overpayment occurred solely because the administrative examination made prior to payment of the transportation bill did not include a verification of transportation rates, freight classifications, or land-grant deductions." 55 Stat. 875, 31 U.S.C. § 82c (1952).

[30] *Hearings Before the Procurement and Buildings Subcommittee of the House Committee on Expenditures in the Executive Departments, on General Accounting Office Audit of Wartime Freight Vouchers*, 80th Cong., 2d Sess. pt. 7 (1948).

E. Overcharges

As originally enacted in the Transportation Act of 1940, section 322 provided for deduction of "overpayment to" instead of "overcharges by" a carrier.[31] The latter phraseology was substituted in 1958[32]—a change significant in two ways. First, but less important, "overpayment" includes purely mathematical and clerical errors made by the Government in paying; the substituted language appears to refer to the acts of carriers. Undoubtedly, Congress did not intend to negate the rather sacred, if not constitutional, right to correct ones' own arithmetic by set-off, particularly if one happens to be the sovereign. Secondly, "overpayment" can be construed as the excess over the lawful rate, but "overcharge,"as defined in the statute,[33] means the excess only above the applicable rate in a tariff or in a pertinent special tender. Tariff rates are sometimes unlawfully high, and in this situation, the change of wording would take on significance.

In certain types of cases, not only the ICC, but anyone, has measures available to determine when a tariff is unlawfully high. For instance, a railroad rate which exceeds the aggregate of intermediate rates via the same route violates section four, part one of the Interstate Commerce Act, unless certain special relief has been obtained from the ICC.[34] Part two of the Act, the Motor Carrier Act,[35] does not contain an aggregate-of-intermediates clause for motor carriers; but the ICC ruled[36] that a through motor rate which exceeded the aggregate of intermediate rates was prima facie unreasonable—therefore, unlawful—under section 216 of the Act.[37]

Railroads frequently refund to commercial shippers the amounts of overpayments above lawful rates in such cases, most of which are inadvertent, through the "voluntary reparations procedure."[38] Under this procedure, the carrier acknowledges the unlawfulness and asks the Commission's permission to make the refund. Part two of the Act does not provide for reparations against motor carriers; and, in the past, shippers have succeeded in recovering the excess paid above lawful rates by suing under the principle of the *Bell Potato Chip* case.[39] It was feared that the change of "overpayment" to "overcharge" in section 322[40] might force the Govern-

[31] 54 Stat. 955, 49 U.S.C. § 66 (1952).
[32] 72 Stat. 860, 49 U.S.C.A. § 66 (Supp. 1958).
[33] *Ibid.*
[34] 54 Stat. 904 (1940), 49 U.S.C. § 4 (1952).
[35] 49 Stat. 543 (1935), as amended, 54 Stat. 919 (1940), 49 U.S.C. § 301 (1952).
[36] For pertinent ICC decisions, see Kingan & Co. v. Olson Transp. Co., 32 M.C.C. 10 (1942); Victory Granite Co. v. Central Truck Lines, 44 M.C.C. 320 (1945); D. E. Bolman Mercantile Co. v. Sante Fe Trail Transp. Co., 38 M.C.C. 561 (1948).
[37] § 216(b) of the Interstate Commerce Act provides: "It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce." 54 Stat. 924 (1940), 49 U.S.C. § 316(b) (1952).
[38] 49 C.F.R. § 1.25 (Cum. Pocket Supp. 1958).
[39] Bell Potato Chip Co. v. Rogers, 156 Ore. 75, 66 P.2d 287 (1937).
[40] Discussed in text at note 31 *supra*.

ment in the future to file thousands of suits against motor carriers to recover such excesses, even where there might be no substantive controversy about the unlawfulness of the rate.

The situation was made even more awkward by a 1959 decision of the Supreme Court, *T.I.M.E. v. United States*,[41] refusing judicial relief as to past unreasonable charges by motor carriers if such charges were made pursuant to a filed tariff. The Court held by a five-to-four vote that, in enacting the Motor Carrier Act, Congress did not intend to provide shippers with any right of reparation; thus, the principle of the *Bell Potato Chip* case is overturned and shippers are denied recovery even through the courts. The adverse effects of this decision upon the shipping public and the difference of result that it produces as between rail and motor carriage will certainly result in efforts to specify by legislation that reparations may be obtained under part two of the Interstate Commerce Act.[42] If such efforts prove successful, then the wording of section 322 may produce the numerous suits by the Government against motor carriers which were foreseen prior to the *T.I.M.E.* case.

Perhaps a better understanding of the military traffic manager's task can be obtained by a further analysis of the *T.I.M.E.* case. Military installations are seldom located at the points of origin and destination used for commodity rates—these points usually being the more populous industrial or commercial centers. Sometimes a military movement is of a type which permits the rate or route technician to make a combination of rates into and out of one of those centers the sum of which will be lower than the through rate would be for the movement from its origin to its destination. This through rate, as already indicated, is, by virtue of the location of military installation, often one of the relatively high class rates which blanket the country. If the rates combined by the technician are motor-carrier rates, he will no longer be able to reap any benefits from the combination, since the Supreme Court's ruling prevents recovery of the difference between the through rate and the aggregate of intermediate rates. The inability to obtain this saving may, in turn, lead him to route the movement by other than motor carrier. If the shipment must, for some reason, move by motor carrier, even though this method costs more, then the Government simply must pay the higher cost, unless it can succeed in negotiating a fair reduction.

As this article is being written, the MTMA, employing in part the experience of the GAO, is screening the country for such situations where motor-carrier through rates may exceed the sum of the parts. A series of negotiations can be expected to ensue with a view toward correcting the awkward situation that has been described.

[41] 359 U.S. 464 (1959).

[42] Late in the first session of the Eighty-sixth Congress, Representative Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, introduced H.R. 8031 (a Bill to Amend §§ 204a and 406a of the Interstate Commerce Act in Order to Provide Civil Liability for Violations of Such Act by Common Carriers by Motor Vehicle and Freight Forwarders, 86th Cong., 1st Sess. (1959)), the purpose of which is to provide for damages under pts. II and IV of the Interstate Commerce Act, which relate to motor carriers and freight forwarders, respectively. This bill, if it became law, would remedy the situation described in the text and would also extend to freight forwarders the right to sue for reparations.

Even with the screening, unexpected examples of this difficulty are almost sure to occur, as unprecedented movements arise or as the dynamic rate situation fluctuates so as to cause aggregate of intermediate rates to fall below through rates. In passing, it should be remarked that much of this complexity and effort would be avoided if the MTMA were able to persuade the carriers to apply to outlying military installations the same rates that apply to nearby populous or industrial centers.

The aggregate-of-intermediate-rates example is, of course, only one of several types of situations in which it may be found that unlawful motor rates have been paid or, conversely, where their payment must be prevented by traffic managers if other requirements permit. The volume of military traffic is so great that any such situation may involve a very substantial sum of money; indeed, for military traffic managers, the volume involved is sometimes so great that the problems created thereby seem not only different in degree, but even different in kind from those faced by industry's traffic managers.

F. Resolving Conflicts with Military Necessity

A few states have at various times enacted laws which, if applied to military traffic, might conflict with military necessity. For instance, a law that limits the length of passenger trains to fourteen cars could interfere with the integrity of an organizational troop movement by rail, as well as cause delay in the execution of the movement. A law concerning mixed passenger and freight trains which requires that passenger cars be placed ahead of freight cars could make it impossible to get heat and hot water to the troops in such a train. In 1941, the Judge Advocate General of the Army took the unequivocal position that such state laws do not apply to federal troop trains.[43]

Obvious principles of interpretation, such as that of avoiding problems of possible unconstitutionality, would support a construction of a state law so it would not conflict with military necessity. If, however, such an interpretation were not adopted, the federal war powers would seem to give authority to move the federal traffic without hindrance from state laws. If a federal statute that was phrased for general applicability but did not name the federal government came in conflict with military necessity in the movement of traffic, these circumstances would point toward applying the principle of construction that the sovereign is not restricted by statute unless named.

G. Some Special Aspects of Military Traffic

As Congress, the courts, and regulatory bodies have long recognized, military traffic differs from the usual commercial and industrial traffic in several substantial

[43] See second endorsement, dated May 8, 1941, and addressed to the Adjutant General, War Department, by The Judge Advocate General of the Army. File 531.7, Office JAGA. An interesting recent case relevant to the relationship between state laws and the needs of military traffic is Pub. Util. Comm'n of California v. United States, 141 F. Supp. 168 (N.D. Cal. 1956), *aff'd*, 355 U.S. 534 (1958), discussed in the text at note 56 *infra*. The Supreme Court has also held that a state statute limiting the length of freight trains moving in interstate commerce is unconstitutional. Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

respects. For instance, many of the items shipped by the military are never, or seldom, found in commercial traffic. This holds true even though in some cases it is possible to find a commercial-traffic item of the same name, for it will have significantly different transportation characteristics. For instance, military vehicles may be far more rugged and constitute heavier revenue loads than vehicles used by the public. The general level of packing for military shipping is much better than the commercial level, one reason for this being the prospect of ocean shipping and rough handling under battle conditions. Military installations are often located away from the large industrial centers and, therefore, are frequently not covered by the commodity rates which have been obtained over the years by industrial-traffic interests to fit the established pattern of commercial traffic. In many instances, military traffic must be moved on short notice, with no published commodity rates to cover that particular type of movement; or it must go over routes and between points where very little or no commercial traffic moves. Military traffic must be responsive to military needs and requires considerable flexibility in rate adjustments, establishment of routes, and authorization of special packing, bracing, or other accessorial services, including on-the-spot rules to meet military requirements.

The flexibility is provided, in the case of surface transportation in the United States, by section twenty-two of the Interstate Commerce Act, the basic portion of which, so far as it concerns government traffic, reads:[44]

> That nothing in this part shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State, or municipal governments . . . or the transportation of persons for the United States Government free or at reduced rates. . . .

The language of the original Act to regulate commerce, which became law in 1887,[45] agrees substantially with the current language above quoted.

The Commission, in its Sixth Annual Report to Congress in 1892, stated:[46]

> In prescribing a general rule of equal charges for like service under similar conditions, Congress nevertheless foresaw the wisdom of continuing certain practices of carriers by which, as the case may be, the interests of the general public, the Government, humanity, religion, and of the carriers themselves were being subserved, and excepted such practices from the prohibition of the law by enacting the twenty-second section.

Congress continued to recognize the difference in government and commercial practice by expanding section twenty-two to include motor carriers, water carriers, and freight forwarders when it enacted parts two,[47] three,[48] and four[49] in 1935, 1940,

[44] 72 Stat. 1264, 49 U.S.C.A. § 22 (Supp. 1958). Another paragraph, discussed *infra* note 66, deals with procedures and antitrust immunity. An indication of the purpose of this special provision for the United States Government is furnished by the following excerpt from § 9 of H.R. 3547, introduced in Congress on Feb. 26, 1878: "Provided, further, that nothing contained in this Act shall prevent the United States from making contracts, or enjoying those already made, for facilities and rates of transportation more advantageous than those accorded to the general public under the provisions of this Act. . . ."

[45] 24 Stat. 387, 49 U.S.C. § 22 (1952).

[46] ICC SIXTH ANN. REP. 26 (1892).

[47] 49 Stat. 543 (1935), 49 U.S.C. § 301 *et seq.* (1952).

[48] 54 Stat. 929 (1940), 49 U.S.C. § 901 *et seq.* (1952).

[49] 56 Stat. 284 (1942), 49 U.S.C. § 1001 *et seq.* (1952).

and 1942, respectively. As late as June 6, 1957, the Senate Committee on Interstate and Foreign Commerce stated:[50]

> Your committee is of the opinion that Government with its numerous complicated operations and emergency situations needs more flexible and speedier means of obtaining rate adjustments than are offered by either rate bureaus or litigation before the Interstate Commerce Commission. . . . The patterns of Government traffic, the location of Government installations for the assembly, storage, and use of goods and supplies, and the exigencies of various agencies, especially those related to national defense, appear to require needs so different from the needs of commercial users of transportation and related services as to justify different treatment in the establishment of adequate and proper rates. Section 22 now allows these unusual needs to be met.

Recognition of the need for special flexibility in rate arrangements for government traffic has not been limited entirely to surface traffic. While the Federal Aviation Act does not contain specific provisions similar to section twenty-two of the Interstate Commerce Act, it does gives the Civil Aeronautics Board broad administrative powers.[51] The Board has provided special exemptions under those powers and has relieved the carriers from certain provisions of the Act and of the CAB's economic regulations when they are transporting military traffic.[52]

The history of one such exemption can be recorded here briefly. Rates in air charter tariffs are based on mileage, frequently with a higher rate for "live" (loaded) mileage than for "ferry" mileage, the latter being the distance required to bring the plane to and from the points of its charter usage. Many charter flights have been engaged for military traffic, predominantly from supplementary air lines. In making advance calculations of cost, the government has been obliged to rely upon carriers' statements of ferry mileage, since it cannot determine whither and whence the planes have to be ferried. Awards were made accordingly until Associated Air Transport, Inc., relying upon the sanctity of the tariff, sued for an accumulation of higher charges that, according to its view, had accrued when the number of actual miles flown was more than the advance calculations. A federal district court ruled on August 12, 1959 that, where a contract or charter with the military conflicts with a tariff, the tariff provisions must prevail.[53] This case is pending on appeal.

Obviously, that decision presented a practical impasse, since government awards of charters cannot be made on such a conjectural basis, with no control over price, even when a supposedly maximum price has been negotiated. Because of the problem presented by the *Associated Air Transport* litigation, an order of the CAB has granted to the carriers named therein an exemption from the provisions of section 403 of the Federal Aviation Act and from the Board's own tariff regulations to the extent that the actual ferry mileage flown exceeds such mileage as is shown in the

[50] Senate Comm. on Interstate and Foreign Commerce, *Providing for Submission by Common Carriers to Interstate Commerce Commission of Quotations Made to the United States Government Under Section 22 of the Interstate Commerce Act*, S. REP. No. 410, 85th Cong., 1st Sess. 4 (1957).

[51] 72 Stat. 743, 771, 49 U.S.C.A. §§ 1324(a), 1386(b) (Supp. 1958).

[52] 14 C.F.R. § 294.3 (1957); Application of Supplemental Air Carrier Conference for Exemption, No. 9862 *et al.*, Order No. 13158, CAB, Nov. 14, 1958.

[53] Associated Air Transport v. United States, Civil No. 6817-M, S.D. Fla., Aug. 12, 1959.

contract with, or bid to, the military.[54] This exemption is, of course, not retroactive and, therefore, will not directly affect the *Associated Air Transport* case. It should also be noted that in seeming recognition of the special considerations that surround military traffic, the CAB has long accepted special tariffs which support annual agreements between the military services (including the Coast Guard) and each of (today) three air-carrier associations.

A number of state laws regulating intrastate transportation contain provisions equivalent to section twenty-two of the Interstate Commerce Act; but in the states without such provisions, the issue has been raised from time to time of the state's authority to prevent or regulate the granting of reduced rates to the United States Government by carriers whose rates fall under state regulation. In *United States v. Pub. Util. Comm'n of California*,[55] the district court rejected in strong language the proposition that the California Public Utilities Commission could interfere in this matter. The Supreme Court sustained the lower court and declared the state law invalid and of no effect in its effort to grant such power to the Commission to prevent or regulate the granting of reduced rates to the United States.[56] Significantly, the opinion quotes from the legislative history of the Armed Services Procurement Act,[57] among other things that,[58]

[54] Application of Supplemental Air Carrier Conference for Exemption, No. 9862, *et al.*, Order No. E-13158, CAB, Nov. 14, 1958.

[55] 141 F. Supp. 168 (N.D. Cal. 1956), *aff'd*, 355 U.S. 534 (1958).

[56] The regulations promulgated by the armed services for military traffic were discussed by the Court, and it was concluded that a conflict between state and federal requirements existed and that under the supremacy clause, U.S. CONST. art. 6, cl. 2, the federal standards must prevail. The majority commented:

"The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record.

"It is the practice of the Government not only to negotiate separate rates which vary from the class or 'paper rate' but also to negotiate a 'freight all kinds' rate which will cover hundreds of diverse items for the supply of a division of the Army or for a vessel that are needed at one place at one particular time. There is no provision in the California Code or the regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abolished:

" 'This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariff and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipments of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made.'

"Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, the shipments will be delayed for Commission action unless shipped under the established rates which are higher than negotiated rates.

"General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial:

" '. . . for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of method to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war.' " United States v. Pub. Util. Comm'n of California, 355 U.S. 534, 544-46 (1958).

[57] Discussed in the text at note 21 *supra*.

[58] 355 U.S. 541 n. 3 (1958).

The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation when the national defense or sound business judgment dictates the use of negotiation. . . .

Clearly the Supreme Court was aware that military traffic presents some special problems and that the military traffic manager should not be handcuffed in dealing therewith.

Special provisions applicable for government traffic are used as judiciously as possible by the MTMA, every effort being exerted towards fair and open dealings. All requests for rate adjustments are placed on file in a "public room," where interested parties may review them. Accepted reduced-rate tenders are also well publicized throughout the country. In addition, Congress in 1957 enacted Public Law 85-246,[59] one of whose provisions requires the filing of copies of special "section twenty-two tenders" with the ICC at the same time they are filed with the interested government agency. The enactment of this law was supported by the Department of Defense.

Under this statute, the ICC is not given any special authority, such as suspension, with respect to these tenders. However, section twenty-two rates are, and always have been, subject to certain important remedies for injured parties. The Supreme Court affirmed in the *Tennessee* case[60] that the Commission has authority to remove undue discrimination, preference, and prejudice, even though they arise from section twenty-two rates. That decision also holds that a reduction may be granted the Government under that section without necessarily creating prejudice. The reason therefor is simple: Briefly, the pertinent provisions of the Interstate Commerce Act are aimed at unfair competition; the Government, not being a part of this competition, can benefit from a reduced rate without hurting other parties.[61]

The standards used by the MTMA in seeking lower rates for military traffic are approximately the same as—and perhaps better than, in some cases—those used by reputable industrial traffic managers in seeking the publication of commodity rates on their commodities or patterns of movement. In fact, MTMA negotiators do not specify to the carriers how a reduction, if granted, is to be published;[62] and the carriers usually employ a special tender rather than tariff publication because it is simple, inexpensive, and more flexible.

A great many standard factors go into determinations of the propriety of a freight rate, although these factors do not have standard weights. Traffic managers, including MTMA traffic managers, cite these various factors, such as commodity characteristics (density, value, loss-and-damage experience, packing, and so forth), loads

[59] 71 Stat. 564 (1957), 49 U.S.C. § 22 (Supp. V, 1958).

[60] Nashville, Chattanooga & St. Louis Ry. v. Tennessee, 262 U.S. 318 (1923).

[61] "The grant of a lower rate . . . to a government . . . may benefit the government without subjecting to prejudice any person, locality, or class of traffic." *Id.* at 323.

[62] In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, the military departments will not prescribe which of the authorized methods will be used. DOD Instruction 4520.3, Transportation Freight Rate Negotiation and Litigation (Domestic), Feb. 2, 1956.

per vehicle, volumes and frequency, vehicle-mile and ton-mile revenue, analogies, and comparisons with established rate-measuring criteria. It is probably not too serious an oversimplification to say that usually the most impelling of all these factors is vehicle-mile revenue. Because of heavy loading and other factors, section twenty-two vehicle-mile revenue on military traffic is far higher than on commodity-rate traffic for industry generally.

Freight rates are of two general kinds: class rates and commodity rates. The former blanket the country and are the "retail catalogue" prices for all the odds and ends of freight service that may be ordered. Industrial shippers who have any considerable volume in any regular pattern approach the carriers and try to persuade them to establish commodity rates to cover their movements; or perhaps the carriers volunteer the rates as a competitive action; or, in some cases, these rates are forced in through action with or by the regulatory bodies.

Because of its unusual pattern with respect to geography, commodity, and directional flow, military traffic is peculiarly vulnerable to the application of class rates. A recent MTMA empirical study conducted with the most careful and objective standards showed that over eighty-six per cent of Department of Defense carload and truckload traffic would have moved under class rates in the absence of section twenty-two. It is widely known in traffic circles that only a small portion of general public traffic moves on class rates, but only occasionally do studies published by the ICC deal with this particular feature. A nation-wide analysis in 1942 showed only 4.1 per cent of total tons (in carloads) moving under class rates.[63] For the Mountain-Pacific territory, a study in 1952 of total interstate carload tonnage and revenue, intraterritorial and interterritorial, showed class rates at about one per cent, both tonagewise and dollarwise.[64] Figures for 1953 showed five per cent of carload dollars as being at class rates.[65]

Contrast with these small proportions the finding that the proportion of military traffic which actually moves under class rates is of the order of seventeen per cent. This is after section twenty-two has had its effect—a circumstance which reveals vividly the vulnerability of military traffic to class rates. This vulnerability is not widely understood; yet, to this writer, it is (or should be) the crux of the perennial arguments that revolve around section twenty-two.

The Reed-Bulwinkle bill, which became section 5a of the Interstate Commerce Act,[66] protected the long-standing practice of conference rate-making by common carriers by immunizing such practices from the antitrust laws, provided that the ICC has approved an agreement of certain substance filed by the carriers concerned. Ever since the enactment of this law, there had been a widespread understanding among the ICC, other government agencies, and the carriers that this immunity extended to special government rates as well as to other rates made by carriers'

[63] Class Rate Investigation, 1939, 262 I.C.C. 447, 479 (1945).
[64] Class Rates Mountain Pacific Territory, 296 I.C.C. 555, 614 (1955).
[65] ICC Monthly Comment on Transportation Statistics, March 1955, p. 10.
[66] 62 Stat. 472 (1948), 49 U.S.C. § 5b (1952).

conferences. This understanding was upset in 1957 by an opinion of the District Court for the District of Columbia;[67] and this ultimately led to the precautionary amendment of section 5a by Public Law 85-246, of which the Chairman of the sponsoring House Committee said:[68]

> The purpose of the amendment is to make it definitely clear that the Congress intended then and it intends now that the application of 5a of the Interstate Commerce Act shall apply to the Government on Section 22 rates, as well as commercial shipments and all other shipments.

III

MOBILIZATION CONSIDERATIONS

Obviously mobilization considerations are a delicate subject; this article does not disclose any figures or concepts which have not previously been placed in records available to the public. It is obvious, too, that, as war science has progressed, calculations of the "adequacy" of the American transportation plant have had to become less and less finite.[69] For example, is the transportation system "adequate" for the needs of the country if, say, from fifty to one hundred of the most attractive targets in the United States have been struck by fusion bombs? In what time frame should adequacy be measured? In what season should its adequacy be gauged—the flood season for our big rivers; the blizzard season for the blizzard states; the striking season for railroad labor, teamsters, or longshoremen; or, perhaps, combinations of these?

Clearly the range of possibilities against which mobilization and war plans must be measured is many times wider than in either of the World Wars. Developments in rocketry and atomic-powered vehicles are only glamorous leaders in advances which have increased the range from total annihilation on the one hand to the smallest "brush fire" incident on the other. The difficulties of forecasting transportation requirements were touched upon in a statement by Major General S. R. Browning, then Deputy Chief of Transportation of the Army, in hearings before a congressional committee considering problems of the railroads:[70]

> Under ideal conditions, requirements' determination is one of the most difficult of deliberative and speculative tasks, requiring forecasting of the military, the political, and the economic situation of the future. Some economist has said that reliable detailed prophecy of the shape of international and national force of even 5 or 10 years from now is beyond human capacity. At best, requirements' determination is based on strong probabilities of a few simple developments which are subject to great uncertainties as to times, places, number of military and civilian populations, new weapons and instrumentalities, and other conjectural circumstances. Critics of the military services' failure to produce adequate and reliable requirements are not familiar with the immensity of the task of war planning and requirements' determination and they fail to see the inability to anticipate

[67] Aircoach Transport Ass'n, Atchison, Topeka & Sante Fe Ry., 154 F. Supp. 106 (D.D.C. 1957).

[68] 104 CONG. REC. 11815 (1958).

[69] Compare the National Transportation Policy, as quoted in note 4 *supra*.

[70] *Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce on Problems of the Railroads*, 85th Cong., 2d Sess. 1807 (1958).

with any finality the nature of military tasks of war, the limitations imposed by budgets on requirements, and the uncontrollable variables inherent in the tasks.

On March 19, 1956, the ICC instituted on its own initiative an investigation and inquiry styled Railroad Passenger Train Deficit.[71] All rail common carriers conducting passenger service, subject to the jurisdiction of the ICC, were made respondents in the proceeding. State regulatory commissions and the general public, including railroad passengers and shippers and receivers of railroad freight, whose freight rates are now bearing a portion of the passenger deficit, were invited to become parties to the proceeding.[72] A cooperating committee of state commissioners, composed of Alan S. Boyd of Florida, Harold K. Davis of New Hampshire, and Ewald W. Lund of Minnesota, sat with the examiners at hearings which extended intermittently from June 18, 1957 to June 23, 1958.[73] The examiner's proposed report in this case, popularly known as the "Hosmer Report," set the transportation fraternity and much of the public by the heels with such conclusions as this:[74]

If railroad passenger-miles (other than commutation) continue to decline at the average rate of reduction between 1947 and 1957, the parlor and sleeping-car service will have disappeared by 1965 and coach service by 1970. It is of course possible that some development may stop the decline and stabilize the traffic at some level lower than that of the present time, but no such development is now in sight.

This report contained a section entitled "National Defense." The Judge Advocate General of the Army, representing Department of Defense interests, and with the concurrence of the MTMA, filed certain exceptions to several statements and conclusions in that section and asked that the section be changed to read as follows:[75]

The National Defense. This aspect is the most critical of all those to be considered and one as to which the evidence, other than as to the needs of the military services themselves, is most deficient. The problem is accentuated by the following observations in the report of the Senate Committee:

"The subcommittee believes, however that the railroads should retain a certain amount of passenger service, whether profitable or not, as part of the railroads' obligation to serve the public and to provide for the national defense. This subject of declining railroad passenger service is recommended for further study."

This raises the question: What is the certain amount of passenger service which must be retained in the public interest, particularly from the standpoint of national defense, and how much unprofitability resulting from that service can the railroads—or perhaps more accurately, the freight shippers—be fairly required to bear? The record in this proceeding furnished no help toward an answer, but it is clear that the rail passenger equipment has approached a point where further reductions may greatly impair the national defense. Much further intensive study probably by the Congress will be necessary.

[71] Docket No. 31954.
[72] *Ibid.*
[73] Railroad Passenger Train Deficit, No. 31954, Examiner's Proposed Report, ICC, Sept. 18, 1958, p. 2.
[74] *Id.* at 70-71.
[75] Exceptions filed Dec. 31, 1958, pp. 13-18.

The Department of Defense presented as a witness a Navy captain serving as Director of Policy and Plans for the Military Traffic Management Agency. His statement, although based upon later information and related solely to the passenger deficit problem, was to the same general effect as one before the Senate Committee on March 27, 1958, by the Deputy Chief of Transportation. The latter statement may properly be noticed here, as the respondents request.

Both of these statements stress the military importance of transportation with particular emphasis on the value of the railroads and their service during World War II and express concern over the decline of the rail transportation plant. The statement of the Director of Policy and Plans, Military Traffic Management Agency, presented additional material to that presented to the Senate, in that he included later information and information as to predicted needs under different mobilization situations.

The military witnesses mentioned the obvious difficulty of forecasting future needs. It is stated that the Department of Defense has developed some requirements for railway equipment under war conditions . . . based on classified war plans which cannot be discussed in open sessions. However, it is possible to disclose that using World War II criteria, for passenger movements it was estimated that the mobilization requirements of the military departments would be 1,047 coaches and 5,684 sleeping cars in the sixth month of mobilization. Presuming a short mobilization period and a smaller military manpower build-up than was the case in World War II, which is a completely different type of mobilization than the one mentioned above, in the first month there would be a requirement for 3,545 sleeping cars and 712 coaches with a gradual decline in the requirement in the following six months. The railroads had 14,000 coaches in 1956, and therefore should be able, in the near future, at least, to supply the necessary coaches. In that year, however, they had only 4,504 sleeping cars, since from 1952 to 1956 the number had been going down at the rate of 400 per year.

Accordingly, faced with the possibility that it might not have enough sleeping cars to accommodate its military personnel on some future M-day, the Department of Defense has stockpiled 1,222 used Pullman cars on its own storage tracks "as mobilization reserve" and it plans to add 300 more.

The defense witnesses agree that "the railroads must possess sufficient capacity to meet an immediate surge of passenger traffic in the event of emergencies" and further that

> "The Department of Defense fully supports the objectives of this proceeding and of Congressional inquiries into this serious problem, and therefore, will continue to cooperate in any feasible way designed to strengthen the potential of our railroads as a measure of national defense."

In conclusion, they point out that "the complex problems of economic adjustment of the passenger deficit, which is now being considered, are largely outside the purview of the Department of Defense" and are the "primary responsibility of management together with the legislative and regulatory bodies that are in the best position to evaluate and pass upon them."

Some other matters connected with the relations between the Department of Defense and the railroads may be noticed. It is stated that in peacetime the Department must avoid preference of one mode of transportation as against another "in the routine procurement of transportation." Therefore, in the fiscal year 1957, 30.5 per cent of its passengers traveled by rail, 25.8 per cent by air, and 43.7 per cent by bus, and the respective percentages of the total charges paid were 36.1, 58.0, and 5.9. Also in peacetime "next to meeting the logistics requirements of the military services, cost is the dominant factor."

Bearing on the relation between railroad passenger service and the national defense is some testimony before the Senate Committee on March 27, 1958, by Major General Edmund C. R. Lasher, retired, former executive director of Military Traffic Management Agency. The following quotation therefrom with emphasis supplied is highly significant:[76]

> "Another point I would like to bring to your attention has to do with the movement of passengers. In time of war, the hundreds of millions of passenger-miles required to recruit, organize, and train a military force is staggering. *The potential that we had for passenger movement at the beginning of the World War II is no longer present on the railroads."*
>
> "Now we can say that more people are traveling today than traveled in 1941, that is true, and we ask: But how are they traveling? They are traveling by Genet's buses, they are traveling by air, they are traveling by private automobile. But what happens when and if we go into a mobilization emergency? Some 375 of the biggest and largest and best airplanes on the airlines today are earmarked for reserve air force fleet operations under so-called CRAF Plan, civil reserve air fleet. Those are aircraft capable of over-ocean travel, but they are also the aircraft which are carrying the bulk of the people today. *So when we get into this emergency, where are we going to carry all these people, not only the military, but the added civilian requirements that go on top of it. I don't know.* Some say put them in boxcars. This soldier sometimes expects a little more, but what of our box car situation? The situation on class A boxcars is not too good today either and in time of war those are the cars we use for the movement of ammunition. *I don't know how we are going to move troops if we should have an emergency tomorrow.* We do not have the capacity. The army has done considerable in setting aside a reserve of passenger cars and is trying to do more. *But the situation on the railroads,* the carrier on which we will have to depend, is serious in my opinion."
>
> . . . . . .
>
> "I believe, further, that all present modes must be placed on equal footing so far as the promotional role of the Government is concerned. In the promotional role I put everything which is not regulatory, including the subject of subsidization and so forth which have come up at least this morning in your questioning."

These statements directly or impliedly suggest the following questions: (1) Is there in the foreseeable future a possibility of some emergency of a military nature which might produce a volume of traffic, military and civilian, such as that which occurred in 1941-45? (2) Do the experts in the field of military transportation generally agree with statements which have been made by individuals of recognized competence in this field to the effect that the railroads do not now have the capacity for such a volume of travel? (3) Are the facilities for highway and air transportation adequate to carry the load satisfactorily without substantial help from the railroads? (4) Are the present promotional policies of the Government in respect of transportation, including subsidization, well adapted to the need of the national defense?

These questions, as before indicated, are promotional in nature and not regulatory.

The evidence of record in this proceeding is more than sufficient to establish that there is not now available sufficient passenger sleeping car equipment to meet the foreseeable military requirement for that type of equipment, but there is nothing in the record to show the other national defense needs and the needs of the civilian economy in the time

[76] *Hearings, supra* note 70, at 1802-03. [Editor's footnote.]

of national emergency. However, it appears that there has been a decline in the supply of sleeping car equipment so that the ability of the railroads to meet the military requirement alone has already been impaired. It is, therefore, vitally necessary that this deterioration of the situation be stopped, especially when it is considered that the military services, without even considering the question of the other defense needs, have foreseeable use under mobilization situations for the entire supply of sleeping car equipment.

The foregoing passage, although not adopted by the Commission, constitutes a fair summary of the national defense aspects of the Commission's investigation and inquiry as viewed by the military traffic manager, in so far as pertinent evidence was received. It should be noted, however, that evidence of defense needs other than those of the military services was "deficient."

The MTMA has been striving to produce a more definitive picture of military transportation passenger and freight requirements in the United States, together with industrially-authenticated estimates of carrier capabilities in the several modes. This is done in cooperation with the Joint Chiefs of Staff, the military services, and carrier industry representatives, and it involves the following basic actions: (1) categories and criteria are established by modes of transportation and kinds of equipment required; (2) the military services furnish the MTMA their requirements, as based upon current war plans approved by the Joint Chiefs of Staff; (3) industrial groups representing respective modes of transportation are asked for, and furnish, estimates of capabilities for a given future time frame; (4) numerous adjustments are made in order to reconcile formats usefully, among the various interests involved; and (5) the products of these efforts are authenticated by the carriers as to capabilities and by the military services as to requirements.

At this writing, unfortunately, these efforts cannot take into account the additional and undoubtedly enormous requirements of the civilian populace and of defense-supporting industry. Even so, the process described, which is being employed for the first time in so comprehensive a fashion, is producing a far more definitive and useful view of military transportation needs versus carrier capabilities than was previously available. The specific results, of course, are Secret. The Kilday Subcommittee[77] has inquired extensively in this field, and the Executive Director of

[77] Subcommittee on Adequacy of Transportation in Event of Emergency of the House Committee on Armed Services.

[As this article goes to press, the report of the Kilday Subcommittee, together with the transcript (unclassified version) of its ten days of hearings on this subject, has been released. Circumstances do not permit extensive revision to convey numerous highly important findings, recommendations, and expressions of the subcommittee. The following extractions—which are, indeed, miniscule—will afford some feeling of the sense of the committee's report:

On military transportation requirements: ". . . . It can be stated that, from the data secured in these sessions, the requirements of the DOD, developed by the services in support of the approved plans, is considerably less than prior forecasts and appears to be within reasonable limits of the commercial carriers' capability, without a serious disruption of essential civilian activity. The current DOD requirements differ from those stated previously by the DOD to various congressional committees and Government agencies, interested in this problem. The marked differences between the past and today stem primarily from current concepts which provide for changes in force structures and from refined methods of calculation.

"In furtherance of its planning, the DOD has in being today the machinery necessary to initiate instantaneously the permitting and routing of DOD traffic under any conditions of emergency.

"No determinations of the adequacy of domestic transportation systems can be calculated based upon

the MTMA, Major General I. Sewell Morris, testified at some length before that subcommittee in executive session on July 23, 1959.

Any thoughtful student of transportation will recognize that the following questions are necessarily among the many which any transportation mobilization planner must take into consideration: What kinds of emergencies should be visualized? What war concepts are involved? What are the more significant trends in capabilities? (For example, the in-service Pullman sleeper fleet has declined from 4220 on February 1, 1957, through 3722 on March 1, 1959, to 2862 on September 1, 1959.) Are discernible trends controllable or subject to countermeasures? What feasible opportunities are available to traffic management in adjusting the use of modes or types of equipment to meet the stresses of imbalance?

Under authority of the Defense Production Act of 1950,[78] as amended, the ICC has prepared twelve transportation mobilization orders to become effective upon a presidential proclamation of a state of civil defense emergency or upon adoption of a congressional resolution. These twelve orders—embracing domestic transportation, storage, port facilities, and other related matters—have been transferred to the OC&DM, which now has responsibility for such planning.

The Interstate Commerce Act, in sections 1(15)-(17), 3(4), and 15(10),[79] provides the ICC with very broad emergency powers relating to car service, including the authority to suspend rules and practices, require the common use of terminals and tracks, and direct preference and priority in the handling, routing, and distribution of traffic in time of emergency. In the event of war or threatened war, and upon certification by the President as to national defense and security, certain traffic will have preference and priority in transportation, and the Commission shall so direct. During World War II, the ICC was granted authority to exercise comparable power over motor carriers to the extent necessary to facilitate prosecution

military requirements alone. There must be a consolidation of the military with essential civilian requirements, including those of the war supporting industries."

On DOD traffic procurement policies: "The policy of the Department of Defense of procuring the lowest cost mode of transportation commensurate with the service requirement and of not according preferential consideration to one mode of transportation as against another in the routine procurement of transportation services, is in accord with a reasonable interpretation of the Armed Services Procurement Act and in consonance with the national transportation policy.

"In view thereof, and in light of the transportation requirements of the DOD as computed within certain hypothetical cases, it is not believed that this policy should be changed and no change is being recommended."

On a national traffic control system: "There was demonstrated in these hearings an obvious urgent need for a National Traffic Control System, in being, staffed by officials in Government and in the transportation industry, who will work together and be ready to operate in time of emergency on a national and regional level. The Military Traffic Management Agency advised that it has the machinery for such an organization in the realm of its responsibility and that it has been tested. The OCDM has such a plan in its executive reserve but this plan, on a national and regional level, has not been fully implemented or tested. It is the recommendation of this committee that a National Traffic Control System be established on a civilian level, that it be implemented on a permanent basis by the OCDM, tested and in a position to be augmented by its executive reserve plan in event of an emergency."]

[78] 64 Stat. 798, 50 U.S.C. App. §§ 2061-66 (1952).

[79] 66 Stat. 277, 49 U.S.C. § 1(15)-(17) (1952); 63 Stat. 485 (1949), 49 U.S.C. § 3(4) (1952); 54 Stat. 911 (1940), 49 U.S.C. § 15(10) (1952).

of the war.[80] Section 6(8) of the Interstate Commerce Act[81] provides that in time of war or threatened war, the carriers are to use every possible means to facilitate and expedite military traffic, and that in time of peace, shipments consigned to the United States are to be delivered as promptly as possible notwithstanding embargoes.

In time of war, the President, through the Secretary of the Army or the Secretary of the Air Force, is authorized to take possession of any transportation system to transport military traffic, or for other purposes related to the emergency.[82] So far as necessary, he may use the system to the exclusion of other traffic.

IV

PROMISING RECENT DEVELOPMENTS

Some recent developments bid fair to strengthen the transportation industry for all purposes, including national defense. In the legislative field, the Eighty-fifth Congress enacted several laws aimed at strengthening the transportation system. Thus, contract carriers by motor vehicle were redefined in an effort to curb encroachment in the common carriage field by contract carriage.[83] The federal transportation tax on the transportation of property was repealed.[84]

By the Transportation Act of 1958,[85] the Interstate Commerce Act was amended: (1) to provide that the Government may guarantee loans to carriers for the purpose of aiding railroad financing; (2) to provide stronger authority for the ICC in dealing with intrastate rates which unduly and adversely affect interstate commerce; (3) to give the Commission new authority over the discontinuance of, or change in, train service; (4) to declare that rates of one mode shall not be held up to a particular level to protect the traffic of any other mode; (5) to redefine the exemptions from regulation for haulers of agricultural products; and (6) to specify that private motor carriage cannot be conducted for business purposes unless within the scope and in furtherance of the operator's primary business enterprise other than transportation.[86] The Federal Aviation Act of 1958 created the Federal Aviation Agency, with its Administrator, and a reconstituted CAB.

[80] 56 Stat. 176 (1942) (expired Dec. 31, 1944).

[81] "In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned." 63 Stat. 486 (1949), 49 U.S.C. § 6(8) (1952). It is interesting to compare the wording of this section with the language of the statutes referred to in note 79 *supra*.

[82] 70A Stat. 266 (1956), 10 U.S.C.A. § 4742 (Supp. 1958); 70A Stat. 587 (1956), 10 U.S.C.A. § 9742 (Supp. 1958).

[83] 72 Stat. 573, 49 U.S.C.A. § 303 (Supp. 1958).

[84] Int. Rev. Code of 1954, § 4272, repealed by 72 Stat. 260 (1958).

[85] 72 Stat. 568, 49 U.S.C.A. §§ 1231-40 (Supp. 1958).

[86] Of course, it has already been emphasized that the military services abstain from private carriage—that is, military vehicles are not used for military traffic. The Transportation Act of 1958 does not affect the legal situation vis à vis military private carriage.

This group of laws was enacted in the enlightened interest of a more robust transportation system for the country, as including, as the National Transportation Policy says,[87] the needs of commerce, the postal service, and national defense. Some of the new statutory provisions are not universally popular and appear to be directed at restoring balances, perhaps in small measure. The simple but significant point probably is that Congress, after rather long and careful study, seems to have concluded that balance needs to be restored.

Probably even more important than legislative improvements are technological advances in recent years. Many of these, such as the strides in improving the speed and lift of aircraft, have been so widely publicized that they need no repetition. Aircraft which take off and land vertically—helicopters and others—are coming into their own and, presumably, will be followed by commercially-feasible vehicles which take off and land vertically but employ the equivalent of conventional fixed-wing principles for forward movement. But these once-fanciful concepts are becoming unsophisticated alongside the prospect of missile and space-vehicle transportation. It is unfortunate that most of us, the public, take scientific advances so complacently. Indeed, many persons would hardly be dumbfounded for long, if at all, at an announcement that transportation of things would give way to transmission and transmutation-reproduction of matter at a distance through electronic reconstruction and arrangement of atoms and molecules. A relatively down-to-earth vehicle recently publicized is one that glides within feet or inches of land or water surfaces, its forward motion being cushioned by a layer of artificially produced compressed air —much as an ice skate glides on a film of water without touching the ice itself. However, some of the more prosaic transportation improvements are, perhaps, appreciated most within a somewhat limited fraternity.

In the movement of freight, doubtless the greatest need for technological advance has been in transfer of shipments from mode to mode. The writer suspects that, statistically, ancient methods still predominate. For instance, the piece-by-piece handling of freight is the same system used on the dhows on the Nile thousands of years ago. Now a number of developments are reforming this picture; among these are the use of pallets (not very new, but expanding and improving), "overcontainers,"[88] transferable vehicle bodies, roll-on-roll-off vessels, auto-railers, and "piggyback." Of special significance is piggyback, which holds promise of solving the vexing problem of destructive competition between trucks and rails. If existing complex circumstances will admit of arriving at the point where long-distance truck freight is piggybacked by rail because the trucker can benefit by using the railroad, there is a bright prospect of the first real breakthrough on this problem.

One of the several piggyback plans—the one under which the shipper or freight forwarder owns the flat cars and the trailers which the railroad hauls for flat rates—

[87] See note 4 *supra*.

[88] The Army and Air Force alone now own about 60,000 "CONEX" overcontainers of dimensions which are described as compatible with the standard sizes proposed by the National Defense Transportation Association Special Subcommittee.

has special national defense significance. Such a trend could cause far more diversified ownership of equipment, thus spreading wider the financing of transportation facilities and removing some of the need to ask for government help.

Yet piggyback may not ultimately continue to be "trailer-on-flat-car"; operational, economic, and competitive dynamics may cause it to give way to trailer bodies on flat cars. "This little piggy" may go to market and leave the "bogie" (undercarriage) at home. Physically, either a trailer or a trailer body is simply one more form of overcontainer. The ICC has ruled, in general effect, that a piggyback trailer is a container rather than an operational motor vehicle, at least in the context of their being furnished by forwarders.[89] This decision by the Commission is at least a milestone in a monumental struggle that has shaped up between railroads and forwarders on the one hand, and truckers on the other. As could have been expected, the advent of piggyback has led to considerable jockeying for economic and legal position. The railroads and forwarders appear to have the advantage just now, with the truckers girding their loins for more combat over the issues of (1) railroads hauling, without trucker sponsorship, traffic in which truckers have acquired "vested interests"; and (2) forwarders handling truckload quantities. It does not seem too optimistic to believe at this stage that the upshot of this struggle will be the one best for the country.

In containerization, the most significant recent development is a concerted move to standardize sizes. In September 1959, the National Defense Transportation Association released a report of a special subcommittee on this subject,[90] a group chaired by Morris Forgash[91] and comprising comprehensive industrial and military membership. The importance of this step, described by the subcommittee as "only a beginning but a real start increasingly overdue," is hard to overemphasize. As stated by Commissioner Arpaia of the ICC, "If standardization is put off too long, ultimate change-over may become expensive."[92]

Piggyback, containerization, and the several other "non-break-bulk" systems which speed the interchange of freight mean that the country can get more out of its transportation plant than before. That, obviously, is good for national defense.

Of course, management and manipulative techniques are as definite a part of the transportation plant as physical technology. Generally, the two phases seem to go hand in hand—that is, progressive management induces technological advances. Certainly one bright new tool stands out—automatic data-processing. It is characteristic of this glamorous, poorly-understood phenomenon that it carries risks of premature decisions by management; here is one area where the old-time, bold autocrat can get himself into deep trouble as easily as he can come out a hero. But for

[89] Forwarder Volume Commodity Rates Between Chicago and New York, I & S No. 6993, ICC, Sept. 4, 1959.

[90] The report recommends that container sizes be standardized compatibly with the dimensions 8 feet wide by 8 feet high, with modular lengths based on two principal lengths, 20 feet and 40 feet.

[91] See note 11 *supra*.

[92] Speech to Central Arkansas Traffic and Transportation Club, March 10, 1959; letter to NDTA, Sept. 17, 1959.

proper applications, certainly it, too, stretches our national plant; and that, too, is good for the national defense.[93]

V

ROOM FOR IMPROVEMENT

How well does transportation in the United States respond to demands for improved technology. Here is a place for some sour notes! The desirable, healthy pattern is for technology and design to follow consumer demand. If people want smaller, economical cars, they get them—after a while. This responsiveness varies greatly from industry to industry, of course, with progress often being stifled by vested, reactionary interests—as, for instance, in some areas in the building trades, where codes are sometimes used to hold back progress.

Transportation is too vital to our national welfare to have its progress thus stifled. But that is happening to a deplorable extent. Shippers, carriers, regulators, and politicians are all contributing to the lag between consumer need and technological response. In the first place, shipper needs are not generally being expressed forcefully enough—although many of the writer's carrier friends will disagree with this assertion.

Take the matter of the complexity of transportation pricing. Seventy-two years after regulation of railroads began, the total structure of rates, rules, and regulations for surface transportation in the United States is a sheer, monstrous, smothering mountain of worms. Everyone favors simplification until his ox starts getting gored. The very word "simplification" has become somewhat odious in transportation circles, because all simplification efforts thus far have not seriously deterred the advance of net complexity. One effect of this massive mess is to help drive shippers away from common carriage toward private carriage, a trend which most transportation statesmen agree is deleterious. Another effect has been to thwart the proper advance of containerization. Efforts to popularize overcontainers extend back at least thirty years. They were needed in commerce about as much then as now; in fact, during the touchy inventory situation of the 1930's, they might have been even more valuable than now, in certain ways. But the complexities of rating freight by commodity helped to discourage their use.

The younger, perhaps more aggressive, air transportation industry has profited by the experience of others and, thus far, has kept its rate structure fairly simple, basing it primarily upon cost of service rather than value of service. What it will look like after seventy-two years of opportunity to become more complex, no one knows.

[93] It may be worthy of mention that the MTMA, which has installed and is using a Univac File Computer, is clasping automatic data-processing to its bosom as rapidly and as realistically as it knows how. Also, of significance are some of the swiftly developing improvements in the communications field; there the MTMA has partially abandoned a small-scale test of facsimile document transmission in favor of other experiments which feature the early capture of digital traffic data for automatic treatment. All these efforts are in keeping with a long-range plan.

From its inception, the trucking industry has leaned more toward cost-of-service pricing than its older brother, the railroads. The railroads are taking it up more aggressively in recent years and indicate their intentions of proceeding vigorously under certain revised rate-making authority provided in the Transportation Act of 1958. Beyond a doubt, the trend toward cost-of-service rate-making will be tempered wisely by legal and moral requirements for justice to shippers, but this does not deny the health of the trend. Carriers are also finding that valuable rate experimentation and research can be conducted on government traffic, under authority of section twenty-two of the Interstate Commerce Act,[94] avoiding some normal frustrations.

One example of archaic complexity: Freight rates are based on short-line railroad distance. Usually, except for the shortest distances, these are academic routes made up of bits and pieces of lines of various railroads, and although theoretically trains can operate over these routes, in most cases they never do. The total calculation of such routes in the United States is so monstrous that it demands electronic computers, and even then is a big, difficult job. If direct air distances became the standard, they could be measured with a piece of string, and the system would be one step nearer automation. Would such a system really be less just to shippers than the old one?

Many years after uniform class-rate reform was undertaken, the railroad and trucking industries each has two principal freight classifications. In time, each will drop one of these, but there will then still be two "uniform" freight classifications. The truckers patterned their classification on that of the railroads, so the differences are not tremendous. Even if the two industries do not get together on the level of freight ratings themselves, the rail and motor classifications, which are somewhat like catalogues, could be made uniform in language and numerical coding. This, too, would be fairly easy, but a big step forward.

Recently, this writer had occasion to reread much of the leading 1912 ICC decision on railway express rates.[95] There the Commission said, in effect, that after exhaustive investigation, it found the existing system not only unjust, but so horribly complex that not even the numerous express companies understood it fully. In short, it was impossible! With masterful incisiveness, the Commission swept away the old rate and documenting system and prescribed a new one. The new system was almost incredibly simple, and it survives to this day not only in its essence, but in most of its particulars. In thirty years in traffic management, this writer has never heard of any shipper who was ruined by its simplicity.

It is remarkable how much of the description of complexity in that 1912 decision could be lifted practically verbatim and applied today to the freight rate and documentation situation. The most reliable forecasters predict massive growth and radical economic and social displacements in the United States within the next ten

[94] See the discussion in the text at note 44 *supra*.
[95] *In re* Express Rates, Practices, and Revenues, 24 I.C.C. 381 (1912).

years; in view of this coming shake-up, would not this be a good time for massive reforms to reduce transportation complexity?

VI

SUMMARY

The military services are the largest user of passenger and freight transportation in the country. Military traffic takes on some of the color of its management, which steadfastly strives to be fair and efficient, and has organized for control, economy, and most of all for readiness. Military traffic management relies completely on commercial carriers, except for the most extreme of emergencies, and employs principles widely accepted as sound industrial traffic management.

The military traffic manager lives mostly in a goldfish bowl and deals with a number of laws somewhat peculiar to his calling. Some of these involve constitutional issues, some deal with government procurement, and some revolve around the complexities of transportation regulation. Opposition to so-called government rate "reductions" largely ignores how peculiarly vulnerable military traffic is to high, catch-all class rates, which are somewhat like the well-known "list" prices.

Adequacy of the national transportation system for defense is a national problem, and not merely a parochial military one. On appropriate occasions, the Department of Defense has furnished Congress and the public with the best information and forecasts it had available at the time; but the evolution of war concepts and the progress of the forecasting art require constant re-evaluation in this field. Current military planning efforts undertake to incorporate carrier estimates of their own capabilities; but, of course, some results of these efforts are classified Secret. Material on mobilization considerations that has been released in connection with certain congressional and ICC hearings indicates that the prospect for adequate American passenger transportation in an emergency is not so good; for freight, it is much better. A grave deficiency is the lack of a national traffic control system ready to control *all* traffic instantly in an emergency, as the MTMA is ready to do for military traffic.

The rate and tariff system for surface freight is monstrously complex, tends to stifle technology, and should be reformed. The attention given in recent years to improvements in legislation, technology, and management is bearing some fruit. In particular, modal interchange of freight is being rapidly improved. Some of these improvements, especially piggyback and standard containerization, hold great hope for the future of American transportation.

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